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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 293

ARMOUR AND COMPANY, A CORPORATION,
Petitioner,

vs.

THE ALTON RAILROAD COMPANY, A CORPORATION, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS.

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Respondents.

BRIEF FOR RESPONDENTS.

THE OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, dismissing the complaint, was filed May 31, 1939. It is reported in 27 Fed. Supp. 625, and appears at pages 46-55 of the record.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit affirming the dismissal of the complaint was filed April 4, 1940; the opinion of the court on rehearing was filed May 21, 1940. Both opinions are reported in 111 F. (2d) 913, and at pages 77-86, and 91-92 of the record.

FOREWORD.

In its brief in this Court Armour and Company is not arguing the case presented by its complaint, but a different case. The complaint was intended to raise, and did raise, this single question: Does the transportation service on livestock which the packers consign to themselves for delivery at the Union Stock Yards, in Chicago, end with the unloading of the stock into pens at that stockyards, or does it extend beyond the unloading and embrace also certain services and facilities incident to the removal of the animals from the stockyards for which services and facilities the Stock Yards Company assesses a so-called yardage charge? As we shall point out, Armour so interpreted its complaint at the time it was filed.

Thereafter, the Interstate Commerce Commission decided the very administrative question raised by Armour's complaint, in a contemporaneous proceeding to which Armour had made itself a party by intervention in order to take advantage of a favorable decision of the issue. The ruling of the Commission was adverse to Armour's claims, however, and, to avoid it, Armour is seeking "to alter or modify the true character of the complaint" as the Court below has found. (R. 92.) Armour's method of accomplishing this change is simply to assume a different state of facts from that alleged in the complaint and admitted by the motion to dismiss.

We shall endeavor to show the Court, first, that the courts below were right in holding that the complaint presents questions requiring preliminary action by the Commission, and second, that the different case which Armour seeks now to present would also raise questions requiring preliminary resort to the Commission.

STATEMENT OF THE CASE.

By its complaint in this case Armour and Company[1] attacks the long established practice respecting "the delivery of livestock consigned to it at Union Stock Yards, Illinois."[2] (Paragraph 2 of prayer; R. 21.) In the prayer for relief, Armour asks:

> "3. That a mandatory injunction be entered requiring the Defendants, and each of them, under penalty of law, on and after a date to be fixed by this court, to provide suitable ingress for Plaintiff to the point at which delivery of such livestock is tendered, and proper and reasonable egress for removal of its livestock from the unloading pens of the Defendants, or from such other point in said station where delivery may be tendered to Plaintiff, *at the Union Stock Yards in Chicago, Illinois,* without the payment of any charge or charges therefor, by Plaintiff, to the Stock Yards Company, or any other person, firm, or corporation, save and except the said rates for transportation of said livestock, lawfully applicable thereto." (R. 21.)[3]

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[1] Petitioner is sometimes referred to herein as "Armour"; Swift and Company as "Swift"; The Union Stock Yard and Transit Company of Chicago as "the Stock Yards Company" or "the Yards Company"; the respondents as "the trunk-line railroads" or "the carriers"; the Interstate Commerce Commission as "the Commission"; the traffic here involved as "direct shipments," namely, livestock which Armour consigns to itself for delivery "at the Union Stock Yards, Chicago, Illinois." (R. 32.)

[2] The definitions of terms used in Armour's brief (p. 2) are misleading. They assume the validity of Armour's claim that a different interpretation should be placed upon its complaint from that made by the two lower courts, and by Armour itself before the Commission. (See p. 30, this brief.) The definitions in Armour's brief of "Union Stock Yards, Illinois" and other terms should be contrasted with the definitions in the complaint itself. (R. 5-7.)

[3] Unless otherwise noted, emphasis in quotations in this brief has been added.

The "Defendants" are the line-haul carriers of the live stock. (R. 5.) The "Stock Yards Company," which is the owner and operator of the public stockyards known as the Union Stock Yards (R. 7) was not joined in this action. The "unloading pens of the Defendants" referred to above "for many years have been, and now are owned and operated by, and located on the property of, the said Stock Yards Company." (Par. 4, R. 6.) The "said station" is defined by the complaint as the facilities of the Stock Yards Company which, it is alleged, for many years "have been designated and used by each of the Defendants as their station or depot, known as Union Stock Yards, in the City of Chicago, Illinois, for the delivery of livestock consigned to commission merchants, packers, and others buying, selling, or receiving livestock at, to or from Union Stock Yards * * *." (Par. 4, R. 6.) The only charges which are paid by Armour and the other packers, aside from the transportation rates, are the tariff yardage charges of the Stock Yards Company published and filed by it with the Secretary of Agriculture covering the facilities and services furnished by it beyond the unloading pens. (Complaint, Ex. B, R. 32-33; Ex. D, R. 35; Par. 6, R. 7.)

In addition to the mandatory injunction, Armour seeks to recover a sum equal to the amount of the tariff yardage charges which it has paid to the Stock Yards Company during the five-year period preceding the filing of this complaint. (Prayer, pars. 4, 5, R. 21.)

Motions to dismiss were filed on the grounds that preliminary action by the Commission was necessary, that the Stock Yards Company was an indispensable party, and that the District Court lacked jurisdiction of certain defendants.

The District Court sustained the motions to dismiss the complaint on all three grounds. The Circuit Court of Appeals affirmed on the ground that the case presented a que

tion for the primary determination of the Commission and held that it was unnecessary to pass upon the other two grounds.

Following that decision, and in connection with a petition for rehearing, Armour incorporated in the record in this proceeding a decision just rendered by the Commission in a case in which both Armour and the defendant railroads were parties, namely, *Swift and Company, et al.* v. *The Alton Railroad Company, et al.*, decided April 8, 1940, reported in 238 I. C. C. 179. (R. 100, *et seq.*)

The *Swift* case and the case at bar ran concurrently. While the lower courts were engaged in this cause in determining whether the complaint presented a question requiring the prior determination of the Commission, that body proceeded to investigate and to rule upon the administrative question brought before it by the Swift complaint. After five hearings, and on an extensive record, the Commission rendered its decision a few days after the decision below.

At the first hearing before the Commission in the *Swift* case, Armour entered its appearance and was granted leave to become a party to the proceeding by petition for intervention then duly filed. In submitting its petition Armour advised the Commission as follows:

> "Mr. Blanchard: * * * we have already invoked the jurisdiction of the courts on the same facts, and same subject matter by filing our suit as set forth in the petition. * * *
>
> * * * * * * *
>
> "Mr. Blanchard: Let the record show that counsel for Armour & Company offers to explain to the Commission that its failure to ask for relief from the Commission was not due to any lack of confidence in the Commission, or lack of confidence in its justness in handling matters of this sort, but merely was because the complainant felt this case would have to go to court anyhow, because the carriers would not obey any order of the Commission until they had tested it in court." (Appendix, this brief, p. xv.)

In its decision the Commission found:

> "Armour and Company filed a petition of intervention in support of the complaint. In this petition it was stated that it had instituted a proceeding in the State Court of Illinois involving substantially the same issues, and praying for similar relief." (R. 101.)

In the face of this record Armour now takes the grave responsibility of asserting in this Court that the case does not involve the same facts and same subject matter as the *Swift* case, but, on the contrary, presents an entirely different controversy.[1]

In an effort to place itself in a position to take advantage of a favorable decision by the Commission, Armour intervened in support of the Swift complaint and advised that body that its case involved the same facts and subject matter. But to avoid the effect of the unfavorable decision by the Commission which has now eventuated, and thus to secure, if possible, different treatment from that accorded its competitor, Armour now contends here that the issues raised by the two cases are entirely different. Its brief here is devoted to an effort to distinguish the two cases, and to show that both courts below completely misunderstood and misconstrued its complaint. In its present brief Armour concedes, at page 12, that all its specifications of error in the petition for writ of certiorari are predicated upon *one alleged difference* in facts now asserted to exist between the complaint in the *Swift* case and the complaint here, namely, that Swift elected to take delivery "through the facilities of the Yard Company"

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[1] Armour's statement of the facts of this case assumes, without so stating, that Armour's present interpretation of the complaint is correct, and disregards the fact that such interpretation is contrary to the one which it had previously asserted to be proper and which the two courts below also held to be the only proper interpretation. The facts as stated in the complaint stand admitted for the purpose of this motion to dismiss, but Armour errs in saying that the very different statement of facts in its brief stand admitted. (Brief, p. 8.)

hereas Armour, it is argued, elected to take delivery at me point other than the stockyards, unless the tariff yard-e charge of the Stock Yards Company against Armour paid by the railroads.

The length to which Armour finds it necessary to go in der to support its present position is illustrated by the atement here of its reasons for intervening in the *Swift* se. It tells the Court:

> "It was conceivable that in the future, Armour might have an occasional shipment which it too would 'elect to take delivery there'; *i. e.*, at the public yards * * *. In substance, Armour may be assumed to have been interested in the question raised by the Swift complaint, of the reasonableness of the practices of the carriers, on any occasional shipments Armour might thereafter order into the public stockyards, to be served by the Stock Yards Company, after transportation had been completed by delivery to the person to whom Armour directed delivery." (Brief, pp. 32, 33.)

We ask that this clear and deliberate representation to is Court be considered in the light of the allegations of e complaint and the record which Armour made in its tition for intervention in the Swift case (Appendix this ief, p. xvi), and its statement to the Commission of reasons for intervening in that proceeding. (Appendix is brief, p. xv.)

In support of a petition for rehearing in the Circuit urt of Appeals, and in the belief that it might be possible make some use of the Commission's discussion of prin-les in the *Swift* case, Armour made the report of the mmission in that case a part of the record in this pro-eding (R. 87, 88) and in respect thereto stated:

> "On April 11th, 1940 (one week after this Court's decision), the Interstate Commerce Commission issued its decision involving the *same railroads* and the *same yards,* passed upon the very administrative questions pointed out by this Court. As we shall show later, it defined the rights of any shipper who elects to make

use of the private property of the Stock Yards Company as a delivering facility for his shipments. As to shipments delivered at other than public stock yards, the Commission followed the reasoning of this Court and finds that transportation includes free delivery, and free egress from the point of unloading.

"Armour was a party to the case wherein the Commission rendered this opinion. But even if it had not been, the Commission's findings upon, and decision of the administrative question involved here, would inure to its benefit, and would be binding upon the Court in a hearing of this case on the merits." * * * (p. 6)[1]

In denying Armour's petition that the case be remanded for trial, the Court below pointed out that the ruling of the Commission was adverse to Armour's claim, and that any proceeding to set the Commission's order aside must follow the statutory procedure. (R. 91-92.)

THIS CASE AND THE SWIFT CASE HAVE A COMMON ORIGIN AND INVOLVE THE SAME SUBJECT MATTER AND THE SAME ISSUES.

The common history and origin of the two cases, the identity of the joint demands of the two packers which the respective proceedings were brought to enforce, and the terms of the complaint establish the identical character of the cases and the absence of any basis for Armour's contention that the facts of its complaint have been misinterpreted.

Approximately fifty years ago, Armour, Swift, and the other Chicago packers formed a purpose to acquire a proprietary interest in the Stock Yards Company and to participate in the earnings accruing to that Company from yardage charges on livestock which then, as now, the packers were consigning to themselves for delivery at the stockyards owned and operated by that Company. Their position was that the services and facilities furnished by the Stock

[1] Brief in Support of "Petition of Plaintiff-Appellant for Rehearing and Motion for Order Remanding the Cause to the Lower Court for Trial, and for a Supplemental Opinion;" filed April 19, 1940. (R. 87.)

Yards Company in respect to their direct shipments, after the unloading thereof; were not a part of the transportation service furnished by the railroads, but a stockyards service, as to which they were free to deal solely with the Stock Yards Company and that their patronage of these services and facilities was a thing of value which they proposed either to sell to, or to withhold from that Company. To accomplish their objective, Armour, Swift and other packers threatened to withdraw their business from the Stock Yards Company, and, to make the threat real, constructed their own yard for the receipt of livestock adjacent to that of the Yards Company. Acting in concert, Armour and Swift then brought suit in the State Court of Illinois to compel the Stock Yards Company (which owned the tracks over which the trunk lines must service the new yard) to permit the trunk lines to deliver livestock at their own yard. In that proceeding in court the packers proved that the trunk-line railroads stood ready to serve the packers' newly constructed receiving yard, and to deliver there all the packers' direct shipments. Upon the basis of this status, thus created, Armour, Swift and the other packers, still acting in concert, effected a deal with the Stock Yards Company, the result of which was that in return for a proprietary interest in the Union Stock Yards, and a share in its profits, the packers deeded over to the Stock Yards Company their own receiving yard, and accepted, established and denominated as their own receiving yard forever, the yards of the Stock Yards Company. The Commission makes detailed findings as to these transactions which it then summarizes as follows:

> "The evidence shows that for more than 70 years, under the usage and practice at the Union Stock Yards, the responsibility of the railroads in respect of direct shipments of livestock consigned to said yards has ended with the unloading service, and that by affirmative action, beginning about 1890 and continuing for many years, the packers, including complainant and

intervener, insisted that the performance of the yardage service upon their shipments was a private matter between themselves and the Yard Company, unaffected by the tariffs covering the transportation charges of the railroads. The position of the packers was that their patronage of the services and facilities of the Yard Company was a thing of value to the Yard Company and that they proposed to sell that patronage to the Yard Company. They succeeded in obtaining an interest in the business of the Yard Company by threats to terminate the practice of taking delivery of their direct shipments through the agency of the Yard Company and to receive the stock at their own yards. As owners of income bonds of the Yard Company, and with a voice in its management (the general counsel of complainant was a director of the Yard Company in 1894), *the packers continued to pay the yardage charges, guaranteed the earnings therefrom for a limited period, and guaranteed for an unlimited period never to receive livestock in Chicago other than at the Union Stock Yards.*" (R. 110-111.)

At the packers' own yard, which, fifty years ago, the trunk-line railroads stood ready to serve, and actually attempted to serve, the packers would have had to unload the livestock at their own expense[1] but they would have been free from the imposition of the yardage charge of which they now complain. The Commission has found that solely to obtain a proprietary interest in the Union Stock Yard and Transit Company, Armour, Swift and the others gave up their own receiving yard and, by agreement, made the premises of the Stock Yards Company, in perpetuity, their own receiving yard.

One reference in the Interstate Commerce Commission's report to Armour's participation in these transactions is as follows:

"The report definitely shows, however, that J. O.

[1] It is only at public stockyards that by custom and by requirement of the Interstate Commerce Act, Sec. 15(5) the unloading is performed by the carriers without extra charge. Armour admits this at page 22 of its brief.

Armour, of Armour & Company, received substantial benefits after 1907 from the earnings of the Yard Company, by reason of the control he exercised with F. H. Prince of Chicago Stock Yards Company, a holding company organized by them for the purpose of controlling the New Jersey Company, which, in turn, owned the Yard Company.'"[1] (R. 110.)

For the services and facilities furnished by the Yards Company in respect to their direct shipments, the packers have always paid the Yards Company a yardage charge in addition to the freight rates. Their patronage in respect to these services they sold to that Company, yet they now ask that the railroads, which had no part in any of these transactions, be required to absorb these yardage charges out of the freight rates. The Commission, which itself determined the measure of, and prescribed the livestock rates on which the livestock is transported, has found that no allowance was made in the rates to cover these stockyards services. The finding of the Commission is as follows:

> "The line-haul carriers have never performed services on direct shipments of livestock transported to the Union Stock Yards after it is unloaded. They have no voice in the nature of the yard services provided or in the manner in which they are performed. *They have never been compensated for any services performed at the stockyards after the placement of the*

[1] In the Report of the Federal Trade Commission to which the Interstate Commerce Commission here refers, the transactions between the Chicago packers and the Stock Yards Company are the subject of a separate chapter, which is introduced by the following statement:

> "The history of the Chicago yards and of the deals by which the packers secured their bonuses and by which Armour & Co. acquired a stock interest in the Maine company [the top holding company owning the Stock Yards Company] is so remarkable that a separate chapter is given to this subject." Report of the Federal Trade Commission on the Meat-Packing Industry, Part III (1919), p. 51.

animals in the unloading pens. The rates applicable on livestock transported to the stockyards do not include any allowance to cover yardage services." (R. 111.)[1]

THIS CASE AND THE SWIFT CASE ARE BASED UPON IDENTICAL DEMANDS BY THE PACKERS IN THE YEAR 1933.

In May, 1933, as the basis for the proceedings later begun by each, Armour and Swift, acting in concert, made identical demands upon the trunk-line railroads in the form of a series of letters. A comparison of the letters, which are exhibits to the complaint here (R. 32-37), with the letters written by Swift and fully discussed by the Commission (R. 105, 106) shows those letters to be identical except for necessary formal differences. (See also Appendix, this brief, pp. vii-ix and xvii.) In those letters Armour and Swift stated that the Stock Yards Company,

[1] The question involved in these cases first came before this Court in *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193 (1935) known as the *Hygrade* case. The full factual situation was not before the Commission or the courts in that case.

The facts developed for the first time in the Commission's investigation in the *Swift* case were brought to light by an investigation of the Federal Trade Commission. That investigation covered the relationship of the large packers to the Union Stock Yard and Transit Company and to the yards at all the principal livestock markets. It brought to the attention of Congress also the relations of Armour, Swift and the other packers with the Stock Yards Company regarding the yardage charge of that company on direct shipments of livestock and showed that the parties had always treated the service covered by that charge as a stockyards service and not a transportation service. It was this investigation which led to the enactment of the Packers and Stockyards Act, 1921 (7 U. S. C. Ch. 9) which subjects the stockyards and all their yardage charges to regulation by the Secretary of Agriculture. That legislation and amendments to the Interstate Commerce Act were pending before Congress at the same time. Paragraph (5) of Section 15 of the Interstate Commerce Act

which had been receiving the livestock as their agent (complaint, par. 15; R. 10-11) would not act as their agent thereafter, and it was demanded that the railroads deliver the livestock to them at the stockyards free from the payment of the yardage charge of the Stock Yards Company.

By these demands the packers sought to obtain preferential treatment as against the livestock producers. The direct shipments of the packers are not purchased through the competitive processes of the public market conducted at the Union Stock Yards, but at points in the country and on the farms. (R. 5, 104.) From the beginning the Stock Yards Company has collected a yardage charge on every animal unloaded on its premises, whether the shipments were direct shipments to a packer or ship-

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was one of the amendments to the Act enacted on March 28, 1920. Of that amendment this Court has said:

> "Paragraph (5) of § 15, was passed February 28, 1920, during and presumably with knowledge of the controversy later brought here in *Adams* v. *Mills, supra.* While declaring that transportation of livestock to public stockyards shall include unloading without extra charge, it left undisturbed the Yards Company's practice of making a charge for livestock *received.* The Packers and Stockyards Act, approved August 15, 1921, subjects public stockyards to regulation by the Secretary of Agriculture. Section 301 (b) defines stockyards services to include, among other things, facilities furnished at a stockyard in connection with the *receiving*, holding and delivery of livestock." (*Atchison, T. & S. F. Ry.* v. *United States,* 295 U. S. 193, 199 (1935).)

Ever since the enactment of the Packers and Stockyards Act the Stock Yards Company has filed with the Secretary of Agriculture its yardage charges covering "the receiving of livestock, and applicable to the direct shipments of the packers" The Secretary has prescribed the rates therefor at a number of yards, and this Court has sustained charges thus prescribed. *Denver Union Stock Yard Co.* v. *United States,* 304 U. S. 470 (1938), and other cases cited in the Commission's decision in the *Swift* case, R. 119.

ments to a commission merchant for sale. (R. 104.) It was the producers who secured the enactment of Section 15(5) and the producers have never complained against the yardage charge. In its decision in the *Swift* case, the Commission, referring to the producers' attack upon the unloading charges in the controversy later settled in *Adams* v. *Mills*, 286 U. S. 397 (1932), said:

> "The producers did not complain against the yardage charge they were then paying, nor have they ever complained against the assessment of that charge. It is significant that at that time the producers were concerned actively with the question of where transportation should be held to end, both by opposing the assessment of an additional charge for unloading and by advocating the amendment to section 15, subsequently enacted." (R. 116.)
>
> * * * * *
>
> "No complaint has ever been made by the producers who sponsored the amendment regarding the payment of the yardage charge." (R. 117.)

The packers' contention that on their own direct shipments transportation does not end with the unloading and that they should be furnished the services and facilities of the Stock Yards Company on such shipments free of the obligation to pay the yardage charge is advanced for the purpose of obtaining preferred treatment for their direct shipments at the expense of the producers whose stock is shipped to the stockyards for sale on the public market. (Cf. p. 39, below.)

SUMMARY OF ARGUMENT.

Armour has three choices in respect to the delivery of its livestock in Chicago, namely, delivery on the public team tracks of the individual defendants, or at the Union Stock Yards, or on its own industry tracks. Of these, it has always elected to consign its shipments to the Union Stock Yards. By its complaint here it attacks the practice under which it is required to pay the tariff yardage charge of The Union Stock Yard and Transit Company on all shipments received at the Union Stock Yards.

To avoid a determination which has just been made by the Interstate Commerce Commission of the very administrative question raised by Armour's complaint, in a proceeding in which Armour is a party, petitioner is seeking to "alter or modify" the true nature of its complaint, as the Circuit Court of Appeals has held. The different case which Armour now seeks to present, however, would likewise raise questions requiring preliminary resort to the Commission.

The clear terms of the complaint impeach Armour's present theory that it did not order its shipments delivered at the public stockyards known as Union Stock Yards. That theory, designed to avoid the decision of the Commission in the *Swift* case, ignores the fact that the demands upon the railroads which Armour and Swift are currently seeking to enforce, were literally identical and were made in concert. The Armour complaint not only alleges affirmatively that delivery at the Union Stock Yards was made at the direction of Armour, but expressly alleges also that the transportation rates in the contracts of transportation applied only to delivery at the stockyards, that the contracts could not be complied with except by delivery at that

point, and that at the destination "Union Stock Yards" there were no facilities for unloading and delivering livestock except those owned and operated by the Stock Yards Company.

The fact that Armour and Swift announced in 1933 that they would no longer pay the customary yardage charges of the Stock Yards Company filed in that Company's tariffs with the Secretary of Agriculture did not qualify their joint demand that their livestock be delivered at the Union Stock Yards. The Commission having now held the assailed practice at Union Stock Yards to be reasonable and lawful, the purpose of Armour's present theory respecting its complaint is to avoid the jurisdiction of the Commission and thus to force the carriers to discriminate in favor of Armour not only as against the producers who ship livestock to the Union Stock Yards but also as against Swift and the other packers.

The issues presented by the complaint, with respect both to the requested injunction which would change the established practice for the future, and to the determination of the validity of Armour's claim and allowance of damages, if any, for the past, are of a nature requiring preliminary resort to the Commission. Among the issues raised is the determination of the exact point at which the transportation of these shipments ends at the Union Stock Yards, which in this case cannot be determined as a matter of law by merely reading the tariffs. The complaint requires the decision of exactly what services would fulfill the carriers' duty to provide reasonable delivery services and whether the established practice is unreasonable. The complaint also demands the payment of allowances by the carriers to Armour, which can be authorized only by the Commission. Rate making is essentially involved in the terms of the complaint, particularly in the determination of damages, if any, which could be measured only by the making of a reasonable rate. Preliminary determination of these

questions by the Commission is necessary because the inquiry is essentially one of fact and of discretion in technical matters, and uniformity can be secured only if its determination is left to the Commission. Moreover, only in that way can there be obtained the benefits of the Commission's expert knowledge of the intricate and complex factual situation.

These issues are not avoided by Armour's present theory of the complaint. Instead, the theory creates additional issues of the same character which are likewise within the Commission's exclusive primary jurisdiction, such as whether the carriers should be required to construct extensive delivery facilities at the Union Stock Yards, but separate from the public stockyards, and what amount would have been a reasonable rate to such facilities had they been constructed in the past.

The Commission's jurisdiction here is based upon the alleged violations of the Interstate Commerce Act which are asserted, implicitly and explicitly, in the complaint. Plaintiff's theory that the need for preliminary resort to the Commission on the substance of the issues may be avoided by the form of the complaint has frequently been rejected by this Court. This is not a suit for loss or damage and the cases plaintiff relies upon have no application here.

The dismissal of the complaint is required not only because of the lack of preliminary resort to the Commission, but also because of plaintiff's failure to join the Stock Yards Company, an indispensable party. That Company owns and operates the only facilities for livestock delivery at Union Stock Yards and assesses and retains the tariff yardage charges attacked here. Finally, the complaint against those defendants who are trustees and receivers was properly dismissed because of plaintiff's failure to obtain consent to bring this suit.

ARGUMENT.

Introduction.

In support of its petition in the court below for rehearing, and for the remand of the case for trial, Armour, referring to the Commission's decision in the *Swift* case, said:

> "Armour was a party to the case wherein the Commission rendered this opinion. But even if it had not been, the Commission's findings upon, and decision of the administrative question involved here, would inure to its benefit, and would be binding upon the Court in a hearing of this case on the merits * * *." (Brief, April 19, 1940, p. 6.)

Nevertheless, Armour now contends that there is no administrative question involved here and that the controlling question raised by its complaint is entirely different from that presented in the *Swift* case. Apart from its relationship to the *Swift* case, we desire to show the Court that this cause presents an administrative question for determination by the Commission and not primarily by a court. Before doing so, however, we shall deal with Armour's effort to change the essential character of the case actually established by its complaint and to repudiate its assertion to the Commission at the time the complaint here was filed, that Armour, by this complaint, had "invoked the jurisdiction of the courts on the same facts, and same subject matter" as the *Swift* case.

These two complainants, Swift and Armour, engaged in the same business, and purporting to be in competition, each with the other, were constantly shipping livestock consigned to themselves at a stockyards which they had made their own, and which, "for a substantial consideration," (R. 111) they had agreed to use for the receipt of

their direct shipments, forever. All of these shipments moved, and could only move on uniform bills of lading (called livestock contracts) in the precise form prescribed by the Commission[1] and on freight rates likewise prescribed by the Commission,[2] which rates were applicable only on shipments to the facilities of the Stock Yards Company. (Complaint, par. 19, R. 13.) The rights of both shippers were and are subject to the provisions of the Interstate Commerce Act, the primary purpose of which, this Court has many times held, is to prevent every kind and form of discrimination. Both shippers have made identical demands upon respondents by means of identical letters, and have received thereto identical replies. This was the status of events in 1933 when Armour and Swift made the joint demands which they now seek to enforce.

Having with Swift this common status resulting from fifty years of joint action, the proposition which Armour seeks here to sustain is that it has so contrived its case in court that it is not bound by the administrative findings of the Commission in the *Swift* case to which it was a party, but on the contrary is entitled to an opportunity through a trial in the District Court to seek from the carriers different treatment from that to which the Commission has found Swift to be entitled. And, strangely enough, in aid of its effort to secure such different treatment Armour insisted that "the Commission's findings upon, and decision

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[1] In *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 295 U. S. 193 (1935) (the *Hygrade* case), this Court said:

> "* * * the Interstate Commerce Commission, acting under authority of Section 15(1) and following a form of clause submitted by shippers and carriers, prescribed a uniform livestock contract * * *." (p. 198.)

[2] *Livestock—Western District Rates, Docket 17000*, 176 I. C. C. 1 (1931).

of *the administrative question involved here, would inure to its benefit, and would be binding upon the Court in a hearing of this case on the merits.*" (Armour's brief in Circuit Court of Appeals, April 19, 1940, p. 6.)

I.

THE DIFFERENCE WHICH ARMOUR ATTEMPTS TO CREATE BETWEEN THE QUESTION PRESENTED BY THE COMPLAINT HERE AND BY THE COMPLAINT IN THE SWIFT CASE DOES NOT EXIST.

We shall state first, and as accurately as Armour's statement of its position will permit, the specific difference between the two cases which Armour seeks to establish in an effort to obtain a different determination of the controversy from that made by the Commission in the *Swift* case.

Secondly, we shall discuss the joint demands of the packers, and their respective complaints, both of which are based on those demands, to show that Armour is now seeking to "alter or modify the true character of the complaint" (R. 92) and that the Circuit Court of Appeals was right in so holding.

A. The Asserted Difference Between the Two Cases.

The Commission has outlined the choice which Swift and Armour had and have in selecting a place of delivery in the Chicago district as follows:

> "Under the provisions of the applicable tariffs of individual railroads serving Chicago, the shippers of livestock have the choice either of consigning it to the Union Stock Yards, and having it unloaded there, without extra charge, or of taking delivery on team tracks of the individual railroads at other points in the Chicago district. In the latter case, they unload the cars themselves. Although the facilities available at such team tracks for the unloading of livestock are not ex-

tensive, and do not include pens into which the stock may be unloaded, they have been found ample for such shipments as have been placed on such tracks for unloading. Many carloads of livestock, consigned principally to the small packers, are received and unloaded on such tracks. In addition, under the tariffs of the line-haul carriers, the packers, including complainant, may, if they choose, specify delivery of direct shipments on industry tracks serving their plants, by paying the published switching charges in addition to the line-haul rate. More than one-third of the direct shipments of livestock arriving at Chicago are unloaded at points other than the Union Stock Yards. It appears, therefore, that direct shipments of livestock are unloaded at the Union Stock Yards only when complainant elects to take delivery there." (R. 111-112.)

Armour recognizes that the Commission's decision "defined the rights of any shipper who elects to make use of the private property of the Stock Yards Company as a delivering facility for his shipments,"[1] and points to the last sentence in the Commission's finding quoted above which shows that Swift elected to take delivery at the Union Stock Yards. Attempting then to distinguish its own situation from that of Swift, Armour states:

"But until evidence shall show that Armour here attempts to recover damages on some shipment which it did order into the public yards, that case (the *Swift* case) cannot concern nor affect the shipments here involved. Armour did not order these shipments into the public yards. They were taken there without its consent, by the willful and disobedient act of the railroad." (Armour's brief, December 2, 1940, p. 33.)

What Armour asserts to be a controlling difference in facts rests on the contention that while its demands upon the railroads, like Swift's, were for delivery at Union Stock Yards, Chicago, Illinois, its demands, unlike Swift's, were for delivery at some point other than the stockyards. As will be shown, however, the demands of both packers were

[1] Armour's brief in Support of Petition for Rehearing in Circuit Court of Appeals, dated April 19, 1940, p. 6.

made in concert, were identical both in substance and in form, and were for delivery at the stockyards. Moreover, the complaint specifically alleges that defendants did not have the required facilities for delivering livestock at Union Stock Yards, Chicago, Illinois, other than those of the Union Stock Yard and Transit Company (Par. 7, R. 7; Par. 19, R. 13); that the facilities of the Stock Yards Company constituted the usual place of delivery, as designated in the Live Stock contract (R. 6, 23) and that the "contract" rates did not apply to any facilities at Union Stock Yards, Illinois, except those of the Stock Yards Company. (R. 13.) The record shows, therefore, that the factual difference relied upon does not exist.

B. Identical Demands of Armour and Swift Constitute the Basis of Both Proceedings.

The complaint here, and that in the *Swift* proceeding, were brought to enforce identical demands which Armour and Swift made upon the railroads in 1933 by letters which are incorporated in Armour's complaint and which are described by the Commission in the *Swift* case. (R. 11, 12, 32-38; R. 105, 106.) The plain terms of those demands destroy the contention now made that Armour consigned its shipments to any point other than the public stockyards at Chicago owned and operated by The Union Stock Yard and Transit Company.

With three choices as to delivery offered to "the shippers of livestock, under the provisions of the applicable tariffs", as the Commission has found, the demands of Armour and Swift were not for delivery "on team tracks of the individual railroads at other points in the Chicago district"[1]

[1] The complaint here alleges, and the Commission found in the *Swift* case, that the team tracks of the defendants which are, and have always been, available to Armour, and are constantly used for livestock unloading by the smaller packers, are located at points in the

or "on industry tracks serving their [the packers'] plants, by paying the published switching charges in addition to the line-haul rate." (R. 111, 112.) Either of these optional deliveries, as the Commission has found, Armour and Swift could have had for the mere asking at any time, without the slightest question or controversy. The demands which produced this controversy were for delivery at the stockyards free from the payment of the tariff charge of the Stock Yards Company.

The letter of May 9, 1933, which describes the shipments covered by the consignments and the demands made in respect thereto, is, in part, as follows:

> "Numerous direct shipments of livestock are *consigned via your line of railroad to Armour and Company or its subsidiaries at the Union Stock Yards, Chicago, Illinois.* By direct shipments are meant shipments in which Armour and Company, or its subsidiaries, are shown as the consignees on the railroad billing at point of origin; which are not purchased on the property of the Union Stock Yard & Transit Company at Chicago; and as to which no use is made of Union Stock Yard & Transit Company services or facilities except such as is incident to the completion of the transportation contract."
>
> * * * * *
>
> "Armour and Company is prepared to accept such shipments at reasonable and proper delivery pens of the carrier at the Union Stock Yards and, within a reasonable time, to remove the livestock therefrom to its own plants *without other use* of the facilities of the Union Stock Yard & Transit Company of Chicago." (Complaint, Ex. B; R. 32, 33.)

Armour thus declares that it had consigned its shipments for delivery at the Union Stock Yards and that it desired to use the facilities of the Stock Yards Company. It then

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Chicago district other than the Union Stock Yards. Paragraphs 7 and 19 of the complaint allege that there are no facilities for the delivery of livestock at Union Stock Yards other than those on the premises of the Stock Yards Company. (R. 7, 13.)

wrote the Stock Yards Company, enclosing copies of its letter of May 9th above, and advising:

> "Kindly accept this as official notice that on and after May 25th, 1933, we shall not pay yardage charges on direct shipments of livestock received or accepted by us in the manner outlined in said letter." (Complaint, Ex. C; R. 34, 35.)

The Stock Yards Company replied in part as follows:

> "So long as Armour and Company route or permit or cause to be routed their shipments of livestock to themselves at the yards of this Company, The Union Stock Yard and Transit Company of Chicago will insist on the payment of its yardage charges before such livestock is released.
>
> • • • • •
>
> "Until and unless your threat of not paying the tariff yardage charges of The Union Stock Yard and Transit Company of Chicago is withdrawn, or until and unless such charges are paid, this Company will not permit livestock *consigned to you at its yards* to be delivered to you or to your employees, on and after May 25, 1933." (Complaint, Ex. D, R. 35, 36.)

Similarly, Armour's letter to the carriers dated May 16, 1933, contained the following:

> "As a matter of information, we furnished the Union Stock Yards & Transit Company of Chicago, Illinois, a copy of our letter to you, dated May 9th, 1933, concerning shipments of livestock consigned to us at Union Stock Yards Station, Chicago, Illinois."
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> • • • • •
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> "You are hereby notified that on and after May 25th, 1933, the Union Stock Yards & Transit Company of Chicago, Ill., has no authority, after unloading such livestock, as your agent, in accordance with its tariff, to thereafter accept, or receipt for such livestock for us, as our agent, for our account, or in our name."
>
> • • • • •
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> "On and after May 25, 1933, any delivery by your railroad of our livestock to the Union Stock Yard & Transit Company of Chicago, Illinois (*other than delivery of such livestock to the Union Stock Yard & Transit Company of Chicago, Illinois, as your agent*

for unloading and delivery to us) will constitute a conversion of our property." (Complaint, Ex. E, R. 36-37.)

In Armour's letter of the same day, to the Stock Yards Company, Armour again stated its purpose that the shipments be turned over by the defendants to the Stock Yards Company and unloaded by that Company at its stockyards. The letter reads, in part, as follows:

> "You are hereby advised that any and all livestock which on or after May 25th, 1933, may be delivered to you by said carriers as their agent for unloading[1] (as provided in your tariff No. 5, I. C. C. No. 8) and for delivery to us as consignee in accordance with the respective contracts of carriage covering the same, will be accepted and received by us from said carriers, (or from you as their agent) and promptly removed from your premises after such acceptance and receipt." (Complaint, Ex. F, R. 37.)

These identical demands are the basis both of Armour's complaint (by paragraphs 16, 17, 18 and 19 at R. 11, 12, 13) and of the *Swift* complaint (by paragraphs VIII, IX and X thereof in appendix to this brief, pp. vii-xi). Armour's petition of intervention in the *Swift* case "concurs in, and adopts the statements made in" those paragraphs and other paragraphs of the Swift complaint. The petition for intervention then continues as follows: "But in so far as said Paragraphs are limited in their application to the business and actions of complainant, Petitioner alleges that said statements are equally true, and equally applicable to and descriptive of the business and actions of Petitioner." (Appendix this brief, p. xvii.)

It is the terms of these identical demands which the Commission discusses at length in its report. (R. 105, 106.) It is these demands which constitute the basis for the Commission's finding that of the three choices available

[1] Unloading is furnished by the railroads only at public stockyards. (R. 111.)

to "the shippers of livestock" "under the provisions of the applicable tariffs," Swift elected to take delivery at the stockyards. (R. 111.) It will be seen, therefore, that the Commission has put the same interpretation upon these joint demands as have the courts below.

C. The Complaint Demands Delivery at the Stockyards.

We turn now to the terms of the complaint by which Armour seeks to enforce these demands jointly made by it and by Swift. Like the demands, the clear allegations of the complaint show that Armour was driven to its present theory after the complaint was filed, and after it had advised the Commission that it involved the same facts and subject matter as the *Swift* case. Every page of the complaint contradicts Armour's contention that it intended and attempted to obtain delivery at any point other than the stockyards, but it is necessary, we believe, to read only seven paragraphs of the complaint, numbers 3, 4, 7, 19, 24, 25 and 26, to recognize the soundness of the finding of the Court below that Armour is seeking "to alter or modify the true character of the complaint." (R. 92.)

The complaint alleges:

> "3. As to all livestock * * * shipped to Union Stock Yards, Illinois, * * * each of said defendants * * * has used for many years, and still uses, *a common depot or station at such point* for the receiving, loading, unloading and delivering of ordinary livestock * * * which includes loading and unloading platforms, chutes, chute pens, alleys, and storage pens, and other facilities *necessary to* the shipment, receipt for shipment, or *delivery of livestock* transported by rail * * *." (R. 5, 6.)
>
> "4. The unloading platforms, chutes, chute pens, alleys, and storage pens *referred to in the preceding paragraph as Defendants' common railroad depot or station*, for many years have been, and now *are owned and operated by and located on the property of, the said Stock Yards Company.*

"For many years, *the facilities of the Stock Yards Company, above described, have been designated and used by each of the Defendants as their station or depot, known as Union Stock Yards, in the City of Chicago, Illinois,* for the delivery of livestock consigned to commission merchants, packers, and others buying, selling, or receiving livestock at, to or from Union Stock Yards * * *." (R. 6.)

"7. That at no time herein involved have the Defendants, or any one of them, owned or operated, or do any of them now own or operate any pens, chutes, or other facilities necessary for the unloading, holding until tender of delivery, and the delivery of livestock, or the receipt of livestock for shipment, at Union Stock Yards, Illinois, but acting in concert, by some lease, agreement, or other arrangement unknown to Plaintiff, have used and still use the platforms, pens, chutes, and other facilities of the Stock Yards Company for such unloading and delivery, and receipt and loading of livestock at said Union Stock Yards station. And each of said Defendants has heretofore published, and now publishes in current tariffs, the consideration paid by it, to said Stock Yards Company for loading or unloading such livestock into or out of cars at said station." (R. 7-8.)

"19. That during all times and dates herein mentioned, each Defendant well knew *that it owned or operated for its own account, no facilities into which shipments of livestock consigned to Plaintiff at said common station, Union Stock Yards, Illinois, could be unloaded,* and from which such shipments of livestock could be tendered or delivered to Plaintiff; and each Defendant well knew that it could not fully perform any of said written contracts for the transportation of such shipments to Union Stock Yards, Illinois, and for delivery thereof to the Plaintiff at such station, *for the consideration named in such contracts,* save by use of the pens, platforms, chutes, and other facilities of its said agent at said station; * * *." (R. 13.)

Here are four allegations of fact which clearly state the meaning of terms used throughout the complaint, as follows:

1. The defendants maintain a common depot or station for the receipt of livestock at "Union Stock Yards, Illinois." (Par. 3).

2. The said common depot is "owned and operated by and located on the property of the Stock Yards Company." (Par. 4).

3. The said facilities of the Stock Yards Company have been designated by the defendants *"as their station or depot known as Union Stock Yards."* (Par. 4).

4. Defendants have no "facilities necessary for the unloading, holding until tender of delivery, and the delivery of livestock at Union Stock Yards, Illinois," except the facilities of the Stock Yards Company, (Par. 7, 19), and the Bill of Lading rate applies only to the Stock Yards Company's facilities at such station. (Par. 19).

On the basis of these clear-cut averments, the allegations of paragraphs 24, 25 and 26 establish beyond dispute the exact nature of Armour's claim.

Paragraph 24 alleges that Armour has

> "* * * sought *only* to be permitted to take possession of its shipments of livestock at the unloading pens used by the Defendants as their depot or station in the Union Stock Yards, Chicago, Illinois, or at whatever point *therein* tender of said livestock was made, *and thence to remove* said shipments of livestock to a public street, or to such other point, off the premises of said Stock Yards Company, as that company, or the Defendants, might designate * * *." (R. 16)

Paragraph 25 alleges:

> "That the Plaintiff has not since May 25, 1933 * * * required the use of any facility of said Stock Yards Company, or any service from said Stock Yards Company, *save such* as was incidental to the unloading, storage pending tender of delivery, tender of delivery, and delivery to Plaintiff * * *." (R. 16)

In the light of the allegations, facts and definitions stated in paragraphs 3, 4, 7 and 19, paragraph 26 is so decisive of the sole issue discussed by Armour that it is quoted below in full:

> "26. Since May 25, 1933, Plaintiff has continuously insisted and demanded, and still demands of the Defendants, that they deliver its livestock to it at the

depot or station designated in their respective tariffs, viz., Union Stock Yards, Illinois, without the imposition of any lien or charge (save and except the respective tariff rates for transportation) against said livestock by any Defendant or its agent, the Stock Yards Company, in all cases where Plaintiff was willing and able to promptly remove such livestock from the unloading pens, or from the point where delivery was first tendered, within a reasonable time after the unloading of same from the cars, but each Defendant has continuously refused and still refuses to effect any such delivery of such livestock to Plaintiff at such station." (R. 16-17.)

Armour thus identifies the facilities of the Stock Yards Company as defendants' station or depot, known as Union Stock Yards, in the City of Chicago, Illinois (pars. 3, 4; R. 5, 6); alleges that they are the only facilities for delivery at that point (par. 7; R. 7); avers that it is only to those facilities that the Bill of Lading rates apply (par. 19, R. 13); declares that it is at the station so defined that Armour has always demanded, and still demands delivery, (par. 26; R. 16) and describes exactly what services and facilities it requires from the Stock Yards Company in respect to such delivery (pars. 24, 25, 26; R. 16) These allegations, which are the heart of the complaint, are not ambiguous. They compel the view expressed by the court below that in an effort to avoid the administrative question, and the effect of the Commission's determination of that question in the *Swift* case, Armour is seeking "to alter or modify the true character of the complaint." (R. 92.)

There are a few additional points respecting the complaint which we desire to bring to the attention of the Court.

D. Armour's Definitions of Terms in Its Brief Are Misleading.

Notwithstanding the terms of the 1933 demands and of the complaint itself; which show clearly that Armour was requiring the delivery of its shipments at the stockyards, it argues now that defendants should have made delivery on their team tracks or through some other facilities stated to be located at "Union Stock Yards, Illinois." As illustrative both of the form and the content of plaintiff's argument on this point, we respectfully direct the attention of the Court to the definition of certain terms appearing on page 2 of its brief, especially the terms "Union Stock Yards, Illinois," "team tracks," and "industry tracks." Here in the form of mere definitions of terms, Armour makes the first effort to give substance to its theory. It does so simply by an interpretation of the complaint which the lower courts rejected. The difference between the terms actually used in the complaint and the definition given to the same terms in the brief, measures the effort which Armour is making to change its case.

In describing "Union Stock Yards, Illinois" as "the entire railroad station 'area' to which the railroads are engaged in transporting 'property, including ordinary livestock'" (page 2) Armour makes reference to a quotation from *United States* v. *American S. & T. Plate Co.*, 301 U. S. 402 (1937), reading as follows:

> "It is conceded that the line-haul rate covers delivery. Such rates are usually made to or from an area, sometimes designated a 'switching district' or 'switching limits.' Within that area the carrier holds itself out as agreeing to deliver freight in its freight depot or at team tracks or on sidings or spur-tracks owned by an industry."[1]

[1] Significantly, in that same decision the Court held that the determination of what is embraced within the service of transportation and what lies outside that service is a matter within the jurisdiction of the Interstate Commerce Commission. (See page 46 below.)

The same quotation is repeated, and again without comment, in connection with the same argument on page 23 of the brief. This statement of the Court had particular reference to Pittsburgh, but it applies generally to every city. The Commission has found, as we have shown, that Armour was not limited to a delivery at the Union Stock Yards, but had, as well, the choice of delivery on the public team tracks of the individual roads located in Chicago, but not at the Union Stock Yards, or delivery at Armour's own plant by paying the applicable switching rate. But plaintiff's purpose in referring to the Court's statement in the case cited is to leave the inference that what is true in respect to the delivery in the city as a whole is true at every point in the city, namely, that at "Union Stock Yards, Illinois," the defendants maintain team tracks and other facilities available for the delivery of livestock. Armour's definitions on brief of "team tracks" and "industry tracks" are intended to give the same understanding. Sufficient answer to this argument is Armour's own clear allegations in paragraphs 4, 7 and 19 of the complaint:

> "For many years, the facilities of the Stock Yards Company, above described, have been designated and used by each of the defendants as their station or depot, known as Union Stock Yards, in the City of Chicago, Illinois * * *" (Par. 4, R. 6.)

> "That at no time herein involved have the Defendants * * * owned or operated or do any of them now own or operate any pens, chutes, or other facilities necessary for the unloading, holding until tender of delivery, and the delivery of livestock * * * at Union Stock Yards, Illinois, but acting in concert * * * have used, and still use the platforms, pens, chutes, and other facilities of the Stock Yards Company." (Par. 7, R. 7.)

The allegations of paragraph 19, (R. 13) which are to the same effect, state, also, the fact that the rates named in the Bill of Lading did not apply to any point at the station Union Stock Yards save the facilities of the Stock Yards Company.

These allegations of the complaint, which was drawn and filed before the plaintiff conceived the theory upon which it now proceeds, are in conformity with the Commission's finding in the *Swift* case that the team tracks of the individual defendants which are and have always been available for the delivery of livestock, and are constantly being used for that purpose, are located not at Union Stock Yards, Illinois, but "at other points in the Chicago district." (R. 111.) A somewhat oblique recognition of the facts of the situation has found its way into Armour's brief in the following statement:

> "That contract was capable of complete performance by the railroad without any use of Yard Company's property whatever, *i. e.*, by electing team track delivery, private siding delivery, *or by the construction or leasing of carrier owned pens within the station limits, at a point removed from the public stock yards.*" (Brief, pp. 24-25.)

E. The Obligation Under the Uniform Bill of Lading in Respect to Place of Delivery.

The first paragraph of Armour's Statement of the Case in its brief is as follows:

> "Armour contracted, on usual bill of lading form (23-30) with the railroad, to transport a shipment of livestock from a certain origin to a station named in Defendants' tariffs as 'Union Stock Yards, Illinois', and there to deliver the shipment to Armour." (Brief, p. 6.)

It is stated further:

> "We have a contract between Armour and the railroad. (Rec. 9.) But that contract merely covers transportation to *any* delivery point in the wide area comprising the station 'Union Stock Yards, Illinois,' that the railroad might select. There was no selection by Armour of team track, private track, public stock yards or elsewhere, as the delivery point." (Brief, p. 23.)

As we have said, the true nature of this case as made by the complaint, and Armour's statement to the Commission respecting the case, are so clear that Armour would seem to be taking a grave responsibility in seeking here to create a different case. The Court may contrast the statement quoted above from Armour's brief that the contract of transportation "merely covers transportation to *any* delivery point in the wide area comprising the station 'Union Stock Yards, Illinois'," with the allegation of fact in paragraph 19 (R. 13) of the complaint that "the consideration named in such contracts," i.e., the transportation rate specified in the Bill of Lading applies only to a delivery through the facilities of the Stock Yards Company.[1]

Furthermore, the complaint alleges in the clearest terms that defendants' common depot or station at Union Stock Yards is and has been for many years the facilities of the Union Stock Yard and Transit Company. (Pars. 3, 4; R. 5, 6.) The "usual bill of lading form" (an exhibit to the complaint) to which Armour refers above, is the form prescribed by the Commission, and it does not provide, as Armour asserts, for "transportation to any delivery point in the wide area." It provides rather, that "the carrier agrees to carry to its usual place of delivery at destination." (R. 23.) Having alleged that the facilities of the Stock Yards Company are, and for many years

[1] This allegation in paragraph 19 of the complaint is in conformity with the provisions of the applicable tariffs under which the rates "named in such contracts" (the bills of lading) apply only "from or to industries, chutes or sidings of the Union Stock Yards & Transit Co., at Union Stock Yards," Section 10, page 129, Chicago Switching Committee Tariff No. 20-W; I. C. C. No. 442. In short, as stated in paragraph 19, the only delivery which defendants could lawfully have made at Union Stock Yards on the rates named and paid was that actually made, namely, delivery in the unloading pens of the Stock Yards Company.

have been, the common depot for the delivery of livestock at Union Stock Yards, Illinois, (pars. 3, 4) and the only such facilities at that point (pars. 7, 19), it cannot now be heard to deny, we submit, that a contract providing for the "usual place of delivery at destination" required delivery at the "common depot or station." The uniform livestock contract to which Armour directs attention is decisive against its contention.

F. Only at Public Stockyards Is Armour Entitled to the Unloading Service Which the Complaint Demands.

It is clear from the terms of Armour's demands in 1933 and from its complaint that it was expecting and insisting upon a delivery which included the unloading of the livestock by the carriers. This is entirely consistent with the demand actually made—that its shipments be delivered at the public stockyards. It is entirely inconsistent with the argument that Armour desired delivery at some other point.

In paragraph 6 of the complaint Armour cites and relies upon Section 15(5) of the Interstate Commerce Act, and declares that "railroads transporting livestock destined to, or received at, public stockyards are required to unload the same." (R. 7.) By its specific terms Section 15(5) requires the carriers to furnish the unloading service, without extra charge, at public stockyards only. (49 U. S. C. Sec. 15(5).) The plaintiff relied upon this section of the Act because it was demanding delivery at a public stockyards.

Paragraph 25 of the complaint states that the facilities and services of the Stock Yards Company which Armour has demanded or required since May 25, 1933, are those which are "incidental to the unloading, storage pending tender of delivery," etc., "all of which Defendants are required by their contract of transportation and by law to

provide for Plaintiff, as to each of such shipments." (R. 16.) This is a clear demand that the carriers provide unloading, a service performed only at public stockyards, coupled with the assertion that Armour demands or requires the facilities and services of the Stock Yards Company for that purpose. Unloading of the livestock is expressly mentioned or demanded in many other parts of the complaint. (Pars. 6, 8, 18, 19, 20, 26 and 28 at R. 7, 8, 12, 13, 14, 16, and 17.)

In its brief here in which it is seeking to set up a different case from that stated in its demands and in its complaint, Armour repeatedly argues that it demanded delivery "in pens." (See, for example, pp. 23-24.) Such statements in the plaintiff's brief are consistent with its complaint, since delivery in pens would necessarily include the unloading of the animals, a service performed only at the public stockyards, but they are not consistent with the interpretation plaintiff now seeks to place upon its complaint. In apparent recognition of this fact plaintiff actually denies at one point in its brief that it desired unloading. (p. 28.) The denial disregards both the terms of the complaint and the definition of the demand, in plaintiff's brief, as requiring delivery in pens. Delivery into pens is furnished only at public stockyards; at all other points the delivery is of the loaded car. As the Commission found in the *Swift* case "the shippers of livestock have the choice either of consigning it to the Union Stock Yards, and having it unloaded there, without extra charge, or of taking delivery on team tracks of the individual railroads at other points in the Chicago district. *In the latter case, they unload the cars themselves.*" (R. 111.)

G. Armour's Refusal to Pay the Yardage Charges Did Not Qualify Its Demand for Delivery at the Stockyards.

What Armour did, as disclosed by its complaint, was clearly to signify its demand that its shipments be transported to and "delivered into suitable pens" at the Union Stock Yards. Its intention that this be done was clear despite its insistence that it not be required to pay the tariff charges of the Stock Yards Company on all animals so consigned to its stockyards. Armour's announcement that it would not pay the charge of the Stock Yards Company did not qualify its directions that these shipments be delivered at the Union Stock Yards. The case is similar in this respect to *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516 (1939), reh. den. 307 U. S. 649. In that opinion the Court through Mr. Justice Reed said:

> "On July 2, 1935, the respondent clearly signified its desire for cars fully coopered and ready for loading. Its letter of that date was an unconditional request for the petitioners' services for a sufficiently specified period of time—'from and after July 1, 1935.' The announcement that respondent would decline to pay for them in no way qualified the request for tariff services, and cannot now stave off liability. The petitioners could disregard this advance disclaimer of liability and rely upon the courts to enforce observance of the tariff. Until changed, tariffs bind both carriers and shippers with the force of law." (P. 520.)

Armour's objection to payment of the yardage charges did not modify its direction that the livestock be delivered at the Union Stock Yards.

H. Because This Case Is Identical With the Swift Case Uniformity in the Treatment of Shippers Would be Gravely Imperiled If This Case Were Decided Initially in the Courts.

It was only four days after the institution of this suit when Armour intervened in the *Swift* case. It was then that Armour first had occasion to place its own interpretation upon its complaint. It did so in the following simple straightforward statement to the Commission:

> "we have already invoked the jurisdiction of the courts on the same facts, and same subject matter by filing our suit as set forth in the petition." (Appendix this brief p. xv.)

This petition of intervention, which plaintiff discusses on page 32 of its brief, "concurs in, and adopts" the principal factual allegations of the Swift complaint. (Appendix this brief p. xvii.) A comparison of the Swift complaint, which has now been ruled upon by the Commission, and of the complaint here, shows them to be substantially identical not only in substance, but in terms. In this connection we direct the particular attention of the Court to paragraph X of the Swift complaint (Appendix this brief, p. xi) and paragraph 24 of the Armour complaint (R. 16) which state the respective demands of the parties almost in the same words. In short, the demands which are the basis of the two complaints were made in identical form, the complaints by which the parties seek to enforce their respective demands are the same in substance and effect, and Armour itself, before conceiving the theory upon which it here relies, took the definite position before the Commission that the facts in the two cases are the same.

Armour's effort to avoid the primary jurisdiction of the Interstate Commerce Commission over the issues of this case constitutes a very real threat to "that uniformity

which it is the purpose of the Commerce Act to secure."[1] It is unusual enough that one shipper should institute independent court proceedings at the very time that a competing shipper has instituted proceedings before the Commission on the same facts and seeking the same relief. But Armour has gone further; it has intervened in the proceeding brought by Swift before the Commission and actively participated in the trial of that proceeding, expressly recognizing and seeking advantage of the Commission's jurisdiction, while at the same time arguing to the courts that the Commission would not even have jurisdiction to determine the identical issues presented by its complaint. Its efforts have been consistent only with a purpose to avail itself of the Commission's decision, if favorable to the packers, while attempting to circumvent its effect if unfavorable. By this means it would achieve an advantage over its competitor, Swift, which has followed the customary and necessary procedure of submitting to the Commission in the first instance its contention that the long established delivery practice at the Chicago Union Stock Yards is unreasonable and therefore unlawful and should be changed.[2] There is no difference between the two cases in facts or in issues, and there is no merit in the claim of a misinterpretation of the complaint which,

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[1] *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 292 (1922).

[2] One result of permitting a trial of the merits of this case in the courts would be that the trial would proceed before a jury or a single judge as a trier of the facts while a three-judge court contemporaneously was passing upon Swift's bill to review the Commission's decision. The essence of the doctrine of the *Merchants Elevator* Case, *supra*, and like cases is that eventual review by this Court of two such diverse proceedings could not assure uniformity of treatment of Armour and Swift. The rules of evidence, the view taken of the facts, and the scope of the review, to mention only three factors, would be materially different.

Armour admits, is the sole predicate of every one of its specifications of error.

It should be noted that the administrative problem is not only to maintain uniformity among the several packers, but also to prevent preferential treatment in respect to the packers' direct shipments, purchased in the country. Acceptance of the packers' demands would be to the prejudice of the shipments of the livestock producers who ship to the stockyards, electing to sell on the competitive market there rather than to sell to the packers at private sale in the country. (See p. 14, *supra*.)

When the complaint is properly given the interpretation placed upon it by the courts below, and initially by Armour itself (which is the same interpretation that the Commission has placed upon the complaint in the *Swift* case), Armour does not deny in this Court that there is an administrative question for the Commission. On the contrary, the existence of such a question would now seem to be tacitly admitted, but such an admission, if made, is not controlling, and we deem it proper, therefore, to present the authorities on the point here as was done below. In the same section of the brief we endeavor to show also that even on the interpretation of the complaint now urged by Armour, questions are presented which require preliminary resort to the Commission.

II.

THE COMPLAINT PRESENTS MANY ISSUES WHICH MUST BE DECIDED IN THE FIRST INSTANCE BY THE COMMISSION.

The complaint seeks a mandatory injunction requiring the carriers to change the established practice for the future by providing what the prayer describes as "suitable ingress" for plaintiff and "proper and reasonable egress for removal of its livestock * * * at the Union Stock Yards in Chicago, Illinois", without the payment by plain-

tiff of the yardage charges assessed against it in the tariffs of the Stock Yards Company. (R. 21.) The complaint also seeks allowances from the carriers to Armour equal to the yardage charges paid by Armour to the Stock Yards Company for a period in the past. Both a change in the practice for the future and the allowances for the past require the determination of administrative and factual issues which must necessarily be decided by the Commission in the first instance. We shall point out, moreover, that the necessity for preliminary resort to the Commission is clear even under plaintiff's present theory of the nature of the demands stated in the complaint.

A. The Decision of the Issue As to Where Transportation of These Shipments Ends Cannot Be Made By a Court in the First Instance.

The Commission's statement of this issue in the *Swift* case applies with full effect to the Armour complaint:

> "The determination of the question at issue in this proceeding requires the determination of the point at which the transportation of direct shipments of livestock to the Union Stock Yards ends. If the transportation ends when the stock is placed in unloading pens, the obligation of the defendants ceases at that point. If, however, the transportation does not end until after complainant has removed the stock beyond the boundary of the stockyards, then there is an obligation on the part of defendants to provide means by which removal of the stock may be accomplished free from the payment of a yardage charge." (R. 112.)

In deciding, after full consideration of the evidence, that transportation of direct shipments consigned to the packers at the Union Stock Yards ends with the unloading into the unloading pens, the Commission made the following statement as to the factors governing that decision:

> "For more than 50 years prior to the enactment of section 15(5) and since its enactment, usage and physical conditions combined to end transportation

on direct shipments of livestock at the unloading pens. The packers, including complainant and intervener, not only acquiesced in the usage and practice, but, in addition, by their agreements with the Yard Company and their participation in the earnings of that company received from its yardage charges, by their guarantee for a limited period of earnings to the Yard Company, and by other acts hereinbefore described, have concurred in the practice and have made it their own." (R. 120.)

Unless the scope of the transportation service should be held to be broader than the parties have always recognized it to be in the past, and broader than the Commission has held it to be, the facilities and services for which the tariff yardage charge of the Stock Yards Company is assessed are wholly separate from the transportation of the shipments and the duties of the carriers in respect to that service.

In dismissing the complaint, the District Court and the Circuit Court of Appeals have applied the rule repeatedly declared by this Court, that the determination of the limits of transportation under the circumstances present here is not a pure question of law to be decided by the courts from a mere reading of the tariffs, but is, instead, a technical inquiry dependent upon the determination of complex questions of fact by the Commission. The purposes of the Interstate Commerce Act can only be achieved by requiring prior resort to the Commission rather than permitting each court or jury to make its own decision, since review by appellate courts will not result in uniformity where issues of fact have been variously decided by juries or trial judges.

Among the cases which have determined that the issue whether a particular service of the character here involved is within transportation is not a pure question of law are two cases dealing directly with services at the Chicago Union Stock Yards.

In *Adams* v. *Mills*, 286 U. S. 397 (1932), this Court ruled that the question whether the unloading service performed by the Stock Yards Company at the Chicago Union Stock Yards was a part of the transportation service, was a question for the Commission and not for the courts. The question presented by the Armour complaint is identical in character with the issue in *Adams* v. *Mills*. There had been preliminary resort to the Commission in that case and the Commission had decided that the unloading was a part of the transportation service and that it was covered by the line-haul rate. Similarly, Armour seeks an order that the carriers have a duty to furnish additional services and facilities beyond the unloading pens and that compensation for those facilities and services is included in the line-haul transportation rate. In affirming the decision for the plaintiffs in *Adams* v. *Mills*, the Court, through Mr. Justice Brandeis, said:

> "Whether the unloading in the yards was a part of transportation was not a pure question of law to be determined by merely reading the tariffs. Compare *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 294. The decision of the question was dependent upon the determination of certain facts, including the history of the Stock Yards and their relation to the line-haul carriers; the history of the unloading charge at these yards; and the action of the parties in relation thereto. If there was evidence to sustain the Commission's findings on these matters, its conclusion that the collection of the extra charge from the shippers was an unreasonable and unlawful practice must be sustained." (pp. 409-410.)

The comparison suggested by the Court between the decision in *Adams* v. *Mills* and that in the *Merchants Elevator* case is of particular significance here. In the latter case, in which the opinion of the Court was also written by Mr. Justice Brandeis, it was held that where the decision required the mere reading of the tariffs, not involving the interpretation of technical words or any practices and

usages, a court could pass upon the question without a preliminary finding by the Commission. On the other hand, the Court stated:

"Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the enquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. *It is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission.* Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented, when the construction of any other document is in dispute." (p. 291.)

* * * * * * *

"But where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by *usage* to the transaction, the preliminary determination must be made by the Commission; and not until this determination has been made, can a court take jurisdiction of the controversy. If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained. For the effect to be given the tariff might depend, not upon construction of the

> language—a question of law—but upon whether or not a particular judge or jury had found, as a fact, that the words of the document were used in the peculiar sense attributed to them or that a particular *usage* existed." *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 292 (1922).

In its opinion in *Adams* v. *Mills* the Court found that the question of whether a particular service of the Stock Yards Company was part of the transportation was not to be determined by "merely reading the tariffs" but was exactly the type of question which, under the rule stated in the *Merchants Elevator* case, must have the primary determination of the Commission. That finding applies here.

A few years later, the Court applied the rule in a case presenting the very facts which are again involved here, *i. e.*, whether transportation of shipments of livestock consigned to packers for delivery at the Chicago Union Stock Yards includes the removal of the animals from the unloading pens to the boundaries of the Union Stock Yards, and whether the customary tariff charge of the Stock Yards Company for the use of the facilities necessary for such removal, in addition to the line-haul rate, is unlawful. *Atchison, T. & S. F. Ry.* v. *United States*, 295 U. S. 193 (1935) (commonly referred to as the *Hygrade* case). The procedure followed there was exactly that followed in the *Swift* case to obtain a determination of the same issue. The case was not presented to a court until after the Commission had made its findings and issued its order. This Court took jurisdiction of the case, thus recognizing that the procedure followed had been the proper one, and ruled in favor of the carriers. That the decision of the issues necessarily involves considerations other than a mere ruling of law, is shown by the Court's stress in that case upon: "Long continued practice and

special conditions'' and ''usage and physical conditions''.[1] (pp. 200, 201.)

This Court has held that these are matters which require an administrative determination by the Commission for the reasons stated in the quotation above from the *Merchants Elevator* case. Commenting very recently upon its decision in the *Hygrade* case, just cited, the Court said that the Commission's order therein was set aside on the sole ground that the Commission's findings were inadequate. *Union Stock Yard and Transit Co.* v. *U. S.*, 308 U. S. 213, 219 (1939).

The character of the question and the need for preliminary resort to the Commission are the same whether the beginning or the end of the transportation service is concerned. In *Mitchell Coal and Coke Co.* v. *Pennsylvania R. R.*, 230 U. S. 247 (1913), the question was where transportation began with respect to certain shipments of coal.

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[1] As we have pointed out, Armour advised the Commission that this case involves the same facts and subject matter as the *Swift* case, but now asserts that the facts in the two cases are entirely different. Petitioner has similarly shifted its position respecting the *Hygrade* case. In the Circuit Court of Appeals Armour relied upon the Commission's findings in both the *Swift* case and the *Hygrade* case as constituting the necessary administrative determination of the question here. In a supplemental brief in the court below filed January 25, 1940, Armour concluded its discussion of the *Hygrade* case as follows:

> ''From the above, it is apparent that plaintiff here demands no more than the Commission had already found to be reasonable, at these same yards, from these same defendants.
>
> ''It follows that the only question of the reasonableness of anything, which might be conjured into this case, has been passed upon by the Commission, *and plaintiff need not present the same question to the Commission again.*'' (p. 25)

In its brief in this Court, however, petitioner argues that the question in the *Hygrade* case was a wholly different question from that presented here. (pp. 19-26.)

The plaintiff argued that transportation began at the station and not at the mines. The Court held that the action could not be maintained without preliminary resort to the Interstate Commerce Commission, saying:

> "But neither the statute nor the tariff defines what are station limits, nor do they fix the exact point from which the transportation must begin, nor the territory within which the delivery must be made. These limits necessarily vary with the size of the communities, the extent of the yards, the practice of the carrier, and the bounds within which it uniformly receives and delivers freight.
>
> "In case any question arose as to the reasonableness of the practice, the limits within which the station rates should apply, or the reasonableness of the allowance paid those shippers who supplied motive power, the Commission alone could act." (pp. 263, 264.)

This decision is directly applicable to the present case. The plaintiff by this suit is attacking the reasonableness of the established practice, asserting that the transportation service and the rates to the Union Stock Yards do not end with the unloading. Plaintiff cites no precise provisions in the tariffs that may be relied upon to give a solution of such problems. These complex and technical questions, as the Court declared in the *Mitchell* case, must be decided by the Commission in its primary jurisdiction rather than by the courts.

Another recent Supreme Court ruling that the determination of the extent of transportation is a matter for the Commission and not for the courts, is *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402 (1937). There the Commission had decided that the spotting of cars on industrial plant tracks was not part of the transportation service and had ordered the railroads to cease rendering the service under their line-haul rates. The decision of the District Court setting aside the Commission's order was reversed by this Court, which said:

> "The Commission is clearly empowered to deter-

> mine what is embraced within the service of transportation and what lies outside that service."[1] (p. 408.)

This decision was relied upon and followed in *United States v. Pan American Petroleum Corp.*, 304 U. S. 156 (1938). The *Los Angeles Switching Case*, 234 U. S. 294 (1914), is to the same effect.

In a similar case, the Court in *Louisville Cement Co. v. U. S.*, 19 Fed. Supp. 910 (D. C. W. D. Ky., 1937), refused to set aside the order of the Commission, saying:

> "It is frequently difficult to determine when delivery is completed or transportation begun. It is a question of fact, and the Interstate Commerce Commission is peculiarly fitted to determine at what point the carrier has begun or completed straight transportation.
>
> • • • • •
>
> "The Commission had the authority to determine in the instant case where transportation under the line haul charge ended." (p. 916.)

These cases hold that the question of whether the facilities and services of the Stock Yards Company beyond that Company's unloading pens are a part of transportation and should therefore be provided by the line-haul carriers is not a proper one for the determination of a court in the first instance. It does not depend upon the mere reading of a tariff. It depends, rather, upon the usage and practice, upon the history of the relations of Armour and the other packers to the practice, and upon the peculiar physical conditions at the Union Stock Yards.

The significance of these factors in the determination of

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[1] The Court also said: "The Commission found that line-haul rates had not been fixed to compensate the carriers for the services in question." (p. 404.) The Commission has made an identical finding in the *Swift* case as follows: "They [the defendants] have never been compensated for any services performed at the stockyards after the placement of the animals in the unloading pens." (R. 111.)

this case is apparent from the Commission's report in the *Swift* case.[1] (R. 100, *et seq.*) As there disclosed, the participation of the packers in the practice of which they now complain has not been limited to acquiescence over a long period of years. Instead, the usage and practice have been confirmed by affirmative agreements between the packers and the Stock Yards Company, which are vital to the decision of this complaint. The physical conditions are also shown by that report to be of great importance here. These include the surrender by Armour of its own pens and facilities for receipt of its direct shipments on its own tracks in Chicago, in consideration of large payments from the Stock Yards Company. They also include Armour's agreement with that Company that as long as the Company conducts its stockyards business at Chicago, Armour will never receive livestock at any point in Chicago, other than at the Union Stock Yards. (R. 110, 111.) Such factors as these show that the question whether transportation of plaintiff's shipments ends at the unloading pens at the Union Stock Yards or continues beyond them is not a pure question of law. Preliminary determination by the Commission is necessary both to secure uniformity of treatment of shippers and to obtain the judgment of the administrative body in respect to an inquiry which "is essentially one of fact and discretion in technical matters." *Merchants' Elevator Case, supra.*

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[1] This Court has heretofore examined the Commission's reports to determine whether the question before it was of such a character as to require administrative action. *Loomis* v. *Lehigh Valley Railroad Co.*, 240 U. S. 43 (1916); *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477 (1918).

B. The Determination of the Kind of Delivery Facilities and Services Which Would Be "Suitable" and "Proper and Reasonable" or Otherwise Adequate to Meet the Obligations of the Defendants Requires Preliminary Resort to the Commission.

Plaintiff argues that the Uniform Live Stock Contract set out in full in the complaint contemplates a delivery at destination. (Brief, pp. 40, 41.) This argument is beside the point. Delivery is contemplated and all the shipments here involved have been delivered. But the complaint requires a decision on the issues of exactly where and in what manner the delivery is to be made, exactly what delivery facilities and services are "proper and reasonable" and what facilities are "suitable." (Complaint, R. 21.) The answer to these issues is not to be found by a mere construction of the tariff or of the Uniform Live Stock Contract. They lie within the field of administrative determination.

The question of the kind of facilities which a carrier must furnish in connection with delivery is no different in character from the question of the kind of facilities to be furnished in connection with any other part of the railroad service. In *Loomis* v. *Lehigh Valley Railroad Co.*, 240 U. S. 43 (1916), the carrier had discontinued its practice of supplying lumber for bins and bulkheads in freight cars. The plaintiff shippers then fitted the cars to serve their needs and sued for the cost of the materials, without preliminary resort to the Interstate Commerce Commission. Their theory was "that the carrier having failed to perform its common law duty to furnish adequate cars, they were entitled to recover as damages their consequent outlay." (p. 47.) Thus their claim was identical in principle with that of appellant in the present case,—the claim that the carriers have failed to perform their common law duty to furnish adequate facilities for delivery and that

they are therefore entitled to recover their consequent outlay. By a unanimous opinion this Court held:

> "An adequate consideration of the present controversy would require acquaintance with many intricate facts of transportation and a consequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs, or character of equipment which it must provide, or allowances which it may make to shippers for instrumentalities supplied and services rendered. In the last analysis the instant cause presents a problem which directly concerns rate-making and is peculiarly administrative. * * * And the preservation of uniformity and prevention of discrimination render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court." (p. 50.)

This decision governs the present case. In *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285 (1921), Mr. Justice Brandeis, speaking of the *Loomis* case, said:

> "The tariff was silent on the subject. The controverted question was not how the tariff should be construed, but what character of equipment should be deemed reasonable." (p. 294.)

The decision of the Circuit Court of Appeals for the 8th Circuit in *J. C. Famechon Co.* v. *Northern Pac. R. Co.*, 23 F. (2d) 307 (1927), illustrates the application of the rule of the *Loomis* case by the lower courts:

> "The character of equipment which the carrier must provide is a problem which directly concerns rate-making, is administrative in character, and on it there should be an appropriate inquiry by the Interstate Commerce Commission before being submitted to a court. *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43, 36 S. Ct. 228, 60 L. Ed. 517." (p. 310.)

The complaint alleges that "for many years" (actually for about 70 years) "the transportation had been completed" and "the contract therefor completely performed" by delivering into pens in the Union Stock Yards. (Par. 15, R. 10.) The questions of the exact point at which and the man-

ner in which delivery should be made at the Union Stock Yards, and the character of the terminal facilities and equipment required to be furnished by the railroads in connection with that delivery which would be, in the words of the complaint, "suitable" or "proper and reasonable," depend upon what should be deemed reasonable under the particular circumstances and in view of the established practice, the history, and the physical conditions. These issues must be determined primarily by the Commission if the benefits of the Commission's expert administrative experience are to be obtained and if uniformity of treatment of shippers and prevention of discrimination are to be preserved.

C. The Complaint Demands the Payment of Allowances to a Shipper Which Can Be Authorized Only By the Inter-State Commerce Commission.

There is another conclusive reason why this complaint must go to the Commission before it is presented to the courts. The payments demanded by Armour in connection with past shipments would constitute allowances from the railroads to a shipper, tantamount to a rebate from the line-haul rate. Not being provided for in the tariffs, such payments would be illegal under the terms of Section 6(7) of the Commerce Act, which reads, in part, as follows:

> "* * * nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs." (49 U. S. C. Sec. 6(7).)

The shipper's recourse is to secure an allowance by the authority of the Commission pursuant to Section 15(13) which provides:

"If the owner of property transported under this

part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be (published in tariffs or schedules filed in the manner provided in this part and shall be)[1] no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section." (49 U. S. C. Sec. 15(13).)

Armour complains that the defendant carriers refused to furnish the services and facilities involved in the removal of the animals from the unloading pens to the boundaries of the Union Stock Yards. Because of this, Armour itself furnished those services and facilities "directly or indirectly," through its payments to the Stock Yards Company. It seeks here to recover its costs for furnishing those services and facilities. On the theory of the complaint, they are a part of the transportation which the defendants would otherwise have had to furnish. It appears from the face of the complaint that there is no provision in the tariffs authorizing such allowances to a shipper. The determination of the justness and reasonableness of a charge for the rendering of transportation services or the furnishing of instrumentalities "directly or indirectly" by the shipper is an administrative or legislative function. By Sec. 15(13) of the Act it is a function committed exclusively to the Commission.

In *Loomis* v. *Lehigh Valley Railroad*, 240 U. S. 43 (1916) (discussed above at pp. 49-50) the shippers' suit against

[1] Words in parentheses added by the Transportation Act of 1940, approved September 18, 1940. (Pub. L. No. 785, 76th Cong., 3rd Sess., Title I, Sec. 10 (d).)

the carrier for the cost to the shippers of certain facilities which, it was alleged, should have been furnished by the carrier under the line-haul rate was held to be improperly maintained in the absence of a preliminary ruling by the Commission. The decision was based not only upon the ground that the determination of the character of equipment to be provided by a carrier must be made in the first instance by the Commission but also upon the ground that the payment of the claims would constitute "allowances" to shippers. In the portion of that opinion set out above at p. 50 the Court stressed the fact that the case involved "allowances which it [the carrier] may make to shippers for instrumentalities supplied and services rendered." In this case, as in the *Loomis* case, the shipper's claim for the cost to it of providing facilities and services which the carriers allegedly should have furnished is a claim for allowances. Preliminary resort to the Commission is necessary here just as it was in the *Loomis* case.

At the last term, this Court again held that suit may not be maintained by a shipper to recover allowances from the line-haul rate, regardless of the form of those allowances, until the Commission has first decided that they were lawful and reasonable. *General American Tank Car Corporation* v. *El Dorado Terminal Co.*, 308 U. S. 422 (1940).

The policy behind the requirement that the Commission determine the justness and reasonableness of allowances to shippers is the fundamental purpose of the entire Act—namely, the preservation of uniform treatment of shippers. If the defendant carriers had departed from the long-settled practice and had voluntarily paid to Armour on each of its shipments the amount of the yardage charges which Armour had paid the Stock Yards Company pursuant to the latter's published tariff, either by a direct payment or by a set-off against the line-haul rate, the carriers would have been subject to penalties for violating

the Act. Such payments would have been rebates, made illegal under the Elkins Act (49 U. S. C. Sec. 41 (1)) and would also have constituted unjust discrimination in favor of Armour, contrary to Section 2 of the Interstate Commerce Act (49 U. S. C. Sec. 2).

This Court has repeatedly held that where payments to shippers cannot be made voluntarily without prior action by the Commission, the courts will neither compel the making of such payments nor allow their retention by shippers if they have already been made. In *Baldwin* v. *Scott County Milling Co.*, 307 U. S. 478 (1939) reh. den. 308 U. S. 631, the rule was summarized as follows:

> "The Act condemns every deviation from lawful tariff rates. It declares that no carrier may lawfully collect a greater or less or different compensation for transportation than the rates specified in the tariff filed nor refund or remit any portion of the rates so specified. § 6 (7); see also § 10 (2). Similarly, it condemns the obtaining of transportation for less than the legally established rate. See § 10 (3) and (4). Involuntary rebates as well as those that are voluntary are prohibited. *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516. *Pittsburgh, C., C. & St. L. Ry. Co.* v. *Fink*, 250 U. S. 577, 582. *New York Central & H. R. R. Co.* v. *York & Whitney Co.*, 256 U. S. 406. By accepting delivery of the coal, respondent became bound to pay the tariff charges. As the commission has found them not unreasonable but lawful, respondent is without right to retain the amount it collected upon the claim that they were excessive." (pp. 484-485)

The case is directly parallel on this point to *Fulton Bag & Cotton Mills* v. *American Ry. Express*, 288 Fed. 854 (D. C. N. D., Tex., 1923). There the carrier had refused to furnish to plaintiff the pick-up service which it was alleged the carrier was obligated to furnish as part of the transportation service. The plaintiff's suit to recover its costs for providing this service after the defendant had refused to provide it was dismissed because the Commission (under the exclusive authority vested in it by Sec-

tion 15 (13)) had not previously ruled that the allowance demanded was reasonable. The Court stated:

> "What the parties themselves could not do voluntarily—what they could not peaceably and nonlitigiously do—certainly this court would not compel nor order them to do." (p. 859)

Another decision to the same effect is *Finkbine Lumber Co.* v. *Gulf & S. I. R. Co.*, 269 Fed. 933 (C. C. A. 5, 1920), certiorari denied, 255 U. S. 574.

Since the carriers did not furnish the services and facilities beyond the unloading pens as demanded by plaintiff, Armour itself, on the theory of the complaint, furnished them "directly or indirectly" by its payments to the Yards Company. Compensation from the carriers to this shipper for furnishing these facilities and services would constitute allowances from the line-haul rate. In the absence of a Commission determination of the "justness and reasonableness" of such allowances, the courts may not require their payment. To do so would be to aid Armour in the recovery of an involuntary preferential rebate.

D. The Allowance of the Damages Requested Would Require the Court to Decide Whether the Rates Paid By Armour Were Unreasonably High for the Services Performed, and If So, What the Exact Amount of a Reasonable Charge Would Have Been at the Different Times the Shipments Were Made.

Assuming, for discussion, that transportation does not terminate at the unloading pens, and as Armour contends, that the carriers are responsible for providing facilities and services for the removal from the premises of the Union Stock Yards Company, nevertheless the plaintiff has sustained no damage unless it has been required to pay more than a reasonable charge for the use of these facilities. Before determining the amount of any allow-

ances or damages to be paid to Armour, the court would be required to decide whether the charge paid by plaintiff for the services received was unreasonable. Such a question can be decided only by the Commission in the first instance and not by a court.

Armour never paid the defendant carriers for any services or facilities beyond the unloading pens. The line-haul rates have never contained any compensation for those services or facilities, since they have never been furnished by the line-haul carriers which receive those rates. This is established by the finding in the *Swift* case, quoted at pages 11-12 of this brief and Armour's complaint confirms the Commission's finding. It is established by the allegations of paragraph 15 of the complaint that the line-haul tariff rates do not compensate defendants for any service beyond the unloading. (R. 10-11.) It is there alleged that "for many years prior to May 25, 1933" the defendants completed the transportation of the livestock and "the contract therefor had been completely performed" by delivering the livestock without providing any services or facilities beyond the unloading pens. It is thus recognized that "for many years prior to May 25, 1933" the Uniform Live Stock Contract did not contemplate any service by defendants other than that now performed. Obviously the tariffs then in effect included no compensation for any such additional service. It is not alleged that any change has been made in the tariffs since May 25, 1933, to cover the additional services demanded of the defendants since that date, and it appears on the face of the Uniform Live Stock Contract itself, which is in the form prescribed by the Commission, that it has remained unchanged since the year 1930. (R. 23; see also par. 19, R. 13.)

It is thus established, both by the finding of the Commission and the allegation of the complaint, that Armour has never paid anything to the defendant line-haul carriers for

services beyond the unloading pens. The fact that the Stock Yards Company assessed and collected charges from Armour for the use of facilities and services beyond those pens could not possibly have damaged Armour unless the aggregate charge was unreasonably high. If the yardage charges were reasonable in amount, Armour has merely been paying a reasonable line-haul rate to the defendants for the transportation to and into the unloading pens, and a reasonable charge to the Stock Yards Company for the "transportation service" (assuming plaintiff's theory) rendered beyond the unloading pens. In that event it has suffered no damages whatsoever.

It seems to be plaintiff's view that it would be unnecessary for the court to determine the exclusively administrative question of the reasonableness of the yardage charge on the theory that if transportation continues through and beyond the unloading pens to the boundaries of the Union Stock Yards, the entire amount of those charges could be recovered from the line-haul carriers because the yardage charges were not published in the tariffs of the Yards Company filed with the Commission but were filed instead with the Secretary of Agriculture. This contention is in conflict with the settled rule, both under the Act and at common law.

As long ago as 1897, in *Parsons* v. *C. & N. W. Railway Co.*, 167 U. S. 447, this Court held that a shipper must prove he has been injured before he is entitled to recover damages. The Court said:

> "The only right of recovery given by the interstate commerce act to the individual is to the 'person or persons injured thereby for the full amount of damages sustained in consequence of any of the violations of the provisions of this Act.' So, before any party can recover under the Act, he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury." (p. 460.)

In *News Syndicate Co.* v. *New York Central R. Co.*, 27
U. S. 179 (1927), the issue was the amount of damages re
sulting from the failure of the carriers to publish a rat
applicable from the Canadian border to New York City
As a result of that failure, the shipper had been require
to pay the through rate from a point in Ontario. Thi
Court held that the Interstate Commerce Commission ha
jurisdiction to determine the reasonableness of the throug
rate since only by finding whether the shipper had paid a
excessive charge could it be determined that the shippe
had suffered any damage. The Court said, in part:

> "The Interstate Commerce Act applies to the line
> that carried, and to the transportation of, the pape
> from the international boundary to New York City
> § 1(1) and (2). It was the duty of defendants in erro
> to establish just and reasonable rates for that service
> § 1(5), § 6(1) and (7). They failed to make or pub
> lish any rate applicable to that part of the transpor
> tation. Section 8 makes them liable for damages sus
> tained in consequence of such failure. *Had the throug*
> *rate been just and reasonable, no damages would hav*
> *resulted to plaintiff in error.*" (p. 186.)

Similarly, in *Great Northern Ry.* v. *Sullivan*, 294 U. S
458 (1935), it was held that proof of a carrier's violatio
of the Interstate Commerce Act did not afford a basis fo
recovery by a shipper unless the total amount paid by th
shipper was unreasonably high. The Court said:

> "But the Commission may not order or permit pay
> ment of damages by way of reparation without find
> ing that the amount of the charge was unjust and un
> reasonable. *News Syndicate Co.* v. *N. Y. Central R*
> *Co., supra*, 187." (pp. 462, 463.)

The same rule has been frequently applied in suits be
fore the Commission. In *Long Beach Chamber of Com
merce* v. *Los Angeles and S. L. R. R. Co.*, 171 I. C. C. 14
(1930), switching charges had been levied in addition to th

line-haul rate. No such additional charges were provided for in the tariffs. The Commission said:

> "It therefore becomes necessary to determine what would have been reasonable charges for the transportation services rendered." (p. 147.)

Similarly, in *Crenshaw Brothers Produce Co.* v. *Seaboard Air Line Railway Co.*, 177 I. C. C. 501 (1931), weighing charges had been collected which were not contained in the tariffs. The plaintiff claimed that the whole amount of the charges should be refunded as the amount of its damages. As to this the Commission said:

> "This contention is without merit. Certainly there are no damages in any proper sense of the word unless the shipper has been compelled to pay more than a reasonable charge." (p. 502.)

An early case in which the same ruling was made with respect to an additional charge to cover refrigeration in transit, no such charge being contained in the tariffs, is *Memphis Freight Bureau* v. *Kansas City Southern Railway Co.*, 17 I. C. C. 90 (1909).

The plaintiff cannot escape this rule by its assertion that the cause of action on which it is suing is one at common law. Under the common law, a plaintiff objecting to a charge made by a carrier could not recover unless he could prove that the rate paid was unreasonably high. The common law rule was summarized by the Court in the *Abilene* case as follows:

> "Without going into detail, it may not be doubted that at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an *unreasonable* sum, the shipper had a right of action in damages. It is also beyond controversy that when a carrier accepted goods without payment of the cost of carriage or an agreement as to the price to be paid, and made an *unreasonable* exaction as a condition of the delivery of the goods, an action could be maintained to recover *the excess over a reasonable charge.* And it may further be conceded

> that it is now settled that even where, on the receipt of goods by a carrier, an *exorbitant* charge is stated, and the same is coercively exacted either in advance or at the completion of the service, an action may be maintained to recover the *overcharge.*" *Texas & Pacific Ry. Company* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436 (1907).

The Court, following this portion of the opinion, pointed to the destruction of uniformity which must follow a determination of such issues by different courts, and held that Sections 9 and 22 of the Act, on which Armour relies, could not be interpreted as preserving primary jurisdiction in the courts in such cases.

Whether Armour's action be regarded as a complaint for violation of the Interstate Commerce Act or for violation of the common law, the determination of damages would necessarily require the determination of whether the total charges were unreasonably high. Only the charge in excess of a reasonable rate can be recovered. Ever since the *Abilene* case, it has been settled that the reasonableness of an interstate transportation rate must be decided primarily by the Commission and not the courts. The Court has tersely stated the rule as follows:

> "But no action for damages alleged to have been caused by the exaction of excessive rates for interstate transportation can be maintained in any court, state or federal, in the absence of a prior finding by the Commission that the rate charged was unreasonable." *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654, 661 (1931).

A recent case directly in point is *Aron* v. *Pennsylvania R. R. Co.*, 80 F. (2d) 100 (C. C. A. 2d 1935), certiorari denied, 298 U. S. 658. There, suit was brought by certain packers, who, like Armour, had shipped livestock consigned to themselves, and like Armour, sought to recover a yardage charge of a stockyards company paid by them for services which they claimed were a part of transportation. The

charge had not been absorbed by the railroad and had been collected in addition to the line-haul rate. The yardage charge was not on file with the Interstate Commerce Commission. The Circuit Court of Appeals for the Second Circuit affirmed a judgment for the defendant, on the ground that a preliminary resort to the Interstate Commerce Commission was necessary and had not been made. The Court held that even if it were assumed that the charge was made for services which constituted a part of transportation, the plaintiffs had not been damaged unless they could show they had paid an amount in excess of the reasonable charge for these services. The Court said:

> "The appellants did not, as they contend, suffer damages in the entire amount paid, but only in so far as the amount charged exceeded a reasonable rate for the services rendered." (p. 102)
>
> • • • • •
>
> "The commission, in making reparations for unspecified and unscheduled charges, has limited recovery to excess over a reasonable charge for services. (citing cases.)
>
> "The determination of damages in the instant case involves a finding of a reasonable rate, and the court will not determine that question without a prior finding by the commission. Although section 9 (49 U. S. C. A. §9) gives an apparently clear right to sue, the courts in the interest of uniformity have declined to accept the decision of questions involving functions essentially belonging to the commission." (p. 103).

E. The Interpretation Which Armour Now Seeks to Place Upon Its Complaint Does Not Avoid the Necessity for Preliminary Resort to the Commission.

The theory which Armour has evolved in an effort to avoid the necessity of preliminary resort to the Commission, is that it forbade the delivery of its livestock to the Union Stock Yards as long as the Stock Yards Company continued the assessment and collection of its tariff yard-

age charges against Armour on those shipments. The demand against the carriers, on this theory, was that they provide facilities and make delivery to Armour at some point at Union Stock Yards, Chicago, Illinois, other than the public stockyards.

To urge this contention, Armour necessarily ignores its explicit definition of the "station or depot," Union Stock Yards, as that term is used in the complaint, as consisting solely of the facilities and property of the Yards Company. (Complaint, pars. 3, 4; R. 5, 6.) By that definition together with the allegations of paragraphs 24, 25 and 26 of the complaint, Armour alleges that it demanded delivery through the facilities of the Yards Company. This is the conclusive answer to the contention in Armour's brief that delivery was demanded anywhere else.

Consistently with the allegations referred to, and by allegations equally explicit, the complaint twice declares that the carriers did not, and do not, own or operate any pens, chutes or other facilities for the delivery of Armour's shipments at the station, Union Stock Yards, and that shipments of livestock to that station could be unloaded and delivered only by the use of the property and facilities of the Stock Yards Company. (See pars. 7, 17, 19 at R. 7, 11, 13, respectively.)

Faced with these allegations of fact Armour has taken pains in stating its present theory to insist that delivery should have been made through some facilities at the Union Stock Yards, other than those of the Yards Company, facilities which it has alleged do not exist, "*or* by the construction or leasing of carrier owned pens within the station limits, at a point removed from the public stock yards" (Brief, p. 25) "*or* at newly constructed pens of their own." (Brief, p. 30.) Plaintiff's theory thus ignores certain vital allegations of the complaint and recognizes others. It ignores the positive allegations that delivery was demanded

through the facilities of the Stock Yards Company, but it recognizes the absence of "other facilities necessary for the unloading, holding until tender of delivery, and the delivery of livestock, at Union Stock Yards, Illinois" (par. 7, R. 7; par. 17, R. 11; par. 19, R. 13), and finally rests on the contention that the carriers could have made delivery by constructing or acquiring delivery facilities of their own at the station, Union Stock Yards, away from the public stockyards, and thus have permitted Armour to receive its shipments within that station without paying the yardage charges of the Yards Company. (Armour's Brief, pp. 25, 26, 30.) The character of such a demand (never actually made) may be seen from the fact that even if the use of the new facilities which Armour says it demanded had been restricted to Armour's shipments alone, they must have been equipped to handle more than ten million head or ninety thousand cars of livestock during the five-year period preceding the filing of this complaint. (Par. 31, R. 18.) The present suit, on plaintiff's theory of the complaint, therefore, is to obtain an injunction forcing the carriers to construct such facilities, and to obtain damages by reason of the carriers' failure to construct and provide them in the past. Both elements of such a demand would require preliminary administrative action.

In *Loomis* v. *Lehigh Valley Railroad Co.*, 240 U. S. 43 (1916), discussed above at page 49, this Court held that the demand of shippers that the carrier provide equipment for bulkheads in freight cars presented a problem which directly concerned rate making and was peculiarly administrative. Preservation of uniformity and prevention of discrimination, it was held, required preliminary resort to the Commission. *A fortiori*, that rule applies to a demand that the carriers construct and provide in Chicago new delivery facilities capable of handling Armour's own shipments of at least two million head of livestock each year.

The discretionary element present in the decision upon any demand that the carriers construct and provide additional delivery facilities for livestock is accentuated here by the fact that there are other points in Chicago to which Armour had and now has the tariff option of consigning its shipments and receiving them without the payment of any yardage charge. (R. 111-112.) At the particular station, Union Stock Yards, Chicago, Illinois, to which Armour's shipments are consigned, the complaint itself alleges that the only facilities for livestock delivery are the property and facilities of the public stockyards. But before the carriers could be required to construct the extensive pens demanded by Armour at some other point, there would have to be an administrative judgment upon the adequacy of the other delivery facilities in the Chicago district, which are available to Armour if it chooses to use them under its tariff option. (R. 111-112.) This is a question for the Commission.

The exercise of the rate making function which would be necessary to a determination of the question presented by plaintiff's theory of the case is even more direct than in the *Loomis* case. The complaint recognizes, and explicitly alleges the fact (par. 19, R. 13) that the Bill of Lading rates applicable to and paid on its shipments applied only to shipments delivered at the Union Stock Yards, *i. e.*, the existing facilities of the Stock Yards Company. Those facilities, by the express terms of the complaint, are the only facilities for the unloading and delivery of livestock at that "station." Rates applicable to some other facilities would have to be established, and, if the carriers were to construct the extensive facilities demanded by Armour,[1] such rates might well be different from those now in effect.

[1] Armour's theory ignores, also, the practical consideration of whether or not the physical situation would permit the construction of any such facilities in this congested area.

No one knows what the amount of a reasonable rate to such a point or points would have been, but it would be necessary to fix such a rate in order to allow damages here, assuming plaintiff was entitled to damages on its theory of the complaint. Unless the line-haul rate to the facilities at the public stockyards, plus the amount of the yardage charges, exceeded the amount of the unknown reasonable rate to the points where Armour contends that the carriers should have provided facilities and made delivery, the carriers' failure to construct and provide the delivery facilities demanded by Armour has not resulted in any damage even in Armour's own theory of the case. The fixing of a reasonable rate is necessary to the success of Armour under its theory of the complaint, and the performance of the rate making function is primarily for the Commission, not the courts. Moreover, all that has been said concerning the need for a decision by the Commission on the making of an allowance by the carriers to Armour applies with equal force to the theory which Armour now seeks to sustain. (See pp. 51 to 55, *supra.*)

It should be pointed out, too, that on Armour's theory the complaint requires a finding not only as to the facilities which would be adequate, and the rate applicable thereto, but a finding also as to the station limits within which such facilities would be established. It is settled law that uniformity in the determination of such an issue can be had only by preliminary resort to the Commission. See *Mitchell Coal and Coke Co.* v. *Pennsylvania R. R.*, 230 U. S. 247 (1913), discussed above at pp. 45-46.

Armour's theory of the cause of action, therefore, is not only in direct conflict with the allegations of the complaint, but like the complaint itself raises questions requiring administrative action by the Commission.

Armour objects to the finding of the Circuit Court of Appeals that this suit is one for damages occasioned by

an alleged overcharge, and that the determination whether or not there was any overcharge requires primary resort to the Commission because of the nature of the issues and the character of the inquiry. (Brief, pp. 28-31.) It is admitted in that discussion, however, that the sole basis for its objection to those findings is its claim that the two lower courts have misinterpreted the complaint. The first answer is that there was no misinterpretation. Plaintiff's present theory of the facts of the case is contrary to the clear allegations of the complaint and squarely opposed to Armour's original position. Moreover, even on Armour's theory, there would exist the factual and administrative questions discussed above, which themselves would require primary determination by the Commission.

III.

THE INTERSTATE COMMERCE COMMISSION HAS JURISDICTION TO DECIDE THIS CASE. IT IS NOT AN ACTION FOR LOSS OR DAMAGE TO THE SHIPMENTS.

Armour's argument against the exclusive primary jurisdiction of the Commission is such that it is forced to argue that the Commission would not even have concurrent jurisdiction. This contention is advanced on the theory that no violation of the Interstate Commerce Act is involved here (Plaintiff's brief in support of petition, August 1, p. 17) and that this suit is merely one for "loss and damage." (Plaintiff's brief, December 2, pp. 33-35.) Both theories are at variance with the facts.

A. This Case Involves Alleged Violations of the Interstate Commerce Act.

In Armour's view, the necessity for preliminary resort to the Commission depends not at all on substance, on the fundamental character of the question actually presented, but purely upon the form which the pleader may give to

his complaint. The complaint in the *Swift* case specifically alleges that the exaction of the yardage charge constitutes an unreasonable practice in violation of Section 1 of the Interstate Commerce Act. (Appendix this brief, p. xii, par. XII). Intervening in that proceeding in support of the complaint, Armour advised the Commission that that case and this case involved the same facts and subject matter, and its petition of intervention, signed by its counsel and verified by its Vice President, alleges in paragraph VI in part as follows:

> "That as a result of said action [the institution of this cause] by Petitioner, it is not necessary to complain here of the fact that, as to Petitioner's shipments, *such repeated breaches do constitute an unreasonable practice as alleged in the complaint herein.*" (Appendix this brief, p. xviii.)

Armour has thus formally asserted before the Commission that the acts here complained of do constitute an unreasonable practice in violation of Section 1 of the Interstate Commerce Act, exactly as did Swift. The position which it is now forced to take, therefore, is that it has found a way to state the same cause of action here in such form as wholly to distinguish this case from the *Swift* case, to compel a different procedure from that governing the *Swift* case, and finally to obtain different treatment from that accorded Swift. Fundamental rights are not so determined. It is the substance and actualities which govern and not the form. This Court has so held. (See cases cited below, p. 72.)

The showing that Armour's claim actually involves a violation of the Interstate Commerce Act does not rest, however, on its sworn pleading in the proceeding before the Commission. Violations of the Interstate Commerce Act are necessarily implicit in the complaint here.

If the established practice of making deliveries at the Union Stock Yards, by which the defendant carriers' responsibility terminates at the unloading pens at the

yards, is not both "just and reasonable" and is not all that is "necessary or proper to secure the safe and prompt * * * delivery of property," then there is a violation of the Act. Section 1(6) of the Interstate Commerce Act provides with respect to practices affecting delivery of property as follows:

> "It is hereby made the duty of all common carriers * * * to establish, observe and enforce just and reasonable * * * practices affecting classifications, rates, or tariffs, * * * the manner and method of * * * delivering property for transportation, the facilities for transportation * * * and all other matters relating to or connected with the * * * transporting, storing and delivery of property * * * which may be necessary or proper to secure the safe and prompt * * * transportation, and delivery of property * * * upon just and reasonable terms, and every unjust and unreasonable * * * practice is prohibited and declared to be unlawful." (49 U. S. C. Sec. 1(6).)

On Armour's theory that defendants should be required to construct extensive new livestock pens and facilities away from the Union Stock Yards but within the station "Union Stock Yards," the failure of the carriers to build and provide such facilities is a violation of this section, should it be determined that they were reasonably necessary to provide proper delivery. If, as Armour argues, there is no violation of the Act involved in the allegations of the complaint, then the established practice must be "just and reasonable" and must be all that is "necessary or proper." But Armour, obviously, would never agree to this, for to do so would be to admit that plaintiff has no complaint on any theory. There is necessarily involved here the issue of whether the delivery practice at the Chicago Union Stock Yards is just and reasonable or whether the carriers are failing to establish just and reasonable practices affecting the delivery and are therefore violating the Act.

The complaint also contains repeated assertions that the yardage charges collected by the Stock Yards Company, and which are published by it with the Secretary of Agriculture, were not on file with the Commission. (See Paragraphs 8, 19, 21, 28 and 31 of the complaint, at R. 8, 13-14, 15, 17 and 19.) Armour contends that these yardage charges have been assessed for the use of services and facilities which are an integral part of the transportation service. The allegations that the charges were collected for transportation services and facilities without being filed with the Commission are direct allegations that Section 6(7) of the Interstate Commerce Act, which forbids the collection of an unpublished charge for transportation services, has been violated. (49 U. S. C. Sec. 6(7).) As shown above, the determination of whether the services for which the charges were collected were transportation services and whether, if so, Armour has suffered any damage from such violation of Section 6(7), requires the determination of administrative questions by the Commission.

Not only is reliance upon a violation of the Act necessarily implicit in the complaint, but there is express reliance, as well. Armour specifically relies upon Section 15(5) of the Act and its reliance on this section shows that an alleged violation of the Act, over which the Commission would have jurisdiction, is involved in the complaint. (It also further proves these shipments to have been consigned to the public stockyards, contrary to Armour's present argument, since that section applies only to public stockyards.)

These alleged violations of the Act are within the jurisdiction of the Commission. If it is true that the established practice respecting delivery of livestock at the Chicago Union Stock Yards is not just and reasonable, and that the yardage charges complained of as not being filed with

the Commission are for services and facilities which should be included within "transportation," then the Commission is expressly authorized to grant the same character of relief sought by Swift before the Commission and sought by Armour in this case, namely, an order requiring a change in a regulation or practice for the future (49 U. S. C. Sec. 15(1)), and the payment of damages for the past. (49 U. S. C. Sec. 16(1).) It is also expressly authorized to determine the reasonableness of the allowance to be paid by carriers for services or facilities directly or indirectly furnished by a shipper in connection with transportation. (49 U. S. C. Sec. 15(13).)

The complaint states the same grounds for relief as those stated by the Hygrade Company in its action before the Commission, summarized by this Court as follows:

> "It claims that the service covered by the charge is included in transportation, §§ 1(3), 15(5); that, not being specified in carriers' tariffs, they are unlawful, § 6; and that the practice of the carriers and Yards Company in making the stockyards their depot for delivery of livestock pursuant to an arrangement by which the Yards Company imposes a yardage charge is an unjust and unreasonable practice in violation of § 1." *Atchison T. & S. F. Ry.* v. *United States,* 295 U. S. 193, 195.

As shown above, the Commission's jurisdiction in these matters is not concurrent but exclusive.

B. This Is Not a Loss and Damage Suit.

Armour repeats in this Court its attempted justification of primary jurisdiction in the courts on the ground that the complaint should be interpreted as stating a cause of action for loss and damage. (Armour's Brief, pp. 33-35.) From the foregoing discussion of the issues presented by the complaint, it is apparent that this is no mere loss and damage suit. The complaint does not charge that the

animals were lost, damaged, or injured, and there is no attempt to recover either their value or the depreciation in that value resulting from any damage or injury to them.

The cases cited by appellant are not in point. In *Galveston, H. & S. A. Ry. Co.* v. *Wallace*, 223 U. S. 481 (1912), the consignee did not receive the goods, and the Court stated that "the presumption arose that they had been lost by reason of the negligence of the carrier or its agents." (p. 492.)

In *Erie R. R. Co.* v. *Shuart*, 250 U. S. 465 (1919), the suit was for the loss or damage occasioned by a collision, and the issue was whether the suit was barred by the limitations clause in the bill of lading.

The difference between such loss and damage cases and this case is apparent. Here the plaintiff is making a direct attack upon what is admittedly a long established practice. (Par. 15, R. 10.) If the practice is unjust and unreasonable, there is a violation of the Interstate Commerce Act. The plaintiff seeks an order changing that practice for the future, and granting damages for the past and the determination of damages would require the determination of reasonable rates. A judgment in favor of Armour would create the very discrimination in treatment of shippers that is forbidden by the Act.

In the loss and damage cases, on the other hand, there is no rule, regulation, or practice involved in any way. There is no question and there is no problem of maintaining uniformity among shippers in order to prevent discrimination. The fact that suits for loss, damage or injury to shipments, not involving violations of the Act over which the Commission has jurisdiction, may be brought in the courts, does not support the maintenance of this cause in the courts until there has been preliminary resort to the Commission.

C. The Necessity for Preliminary Resort to the Commission Depends Upon the Substance of the Issues to Be Determined and Not Upon the Form in Which the Cause of Action Is Stated.

Armour argued below and argues indirectly here that this suit arises from an alleged breach of the carriers' common law duties, the contract duties imposed by the Uniform Live Stock Contract, and the duties imposed by the Bills of Lading Act, and that therefore the necessity for preliminary resort to the Commission may be avoided. As shown above, however, the complaint charges the violation of the Interstate Commerce Act, both explicitly and by necessary effect. These alleged violations are of a character which require an exercise of the administrative judgment of the Commission. The necessity for preliminary resort to the Commission is based upon the substance and actuality rather than the form of the complaint.

The decisive answer to the contention that preliminary resort to the Commission is unnecessary because plaintiff relies on the common law is that in many of the principal cases holding that preliminary resort to the Commission was required, including the leading *Abilene* case itself, the complaint was drawn to state a cause of action at common law. In each of the following cases the plaintiff had phrased its complaint as a common law cause of action, yet this Court held that none of them could be maintained without preliminary resort to the Interstate Commerce Commission. *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907); *Loomis* v. *Lehigh Valley R. R.*, 240 U. S. 43 (1916); *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477 (1918); *Midland Valley R. R.* v. *Barkley*, 276 U. S. 482 (1928).

In the leading *Abilene* case, 204 U. S. 426, this Court said:

"Adopting the construction of the pleadings evi-

dently given them in the briefs, and treating it as presented, the case, briefly stated, is an action by appellant for damages for a *violation of an alleged common law right,* * * *." (pp. 432, 433.)

The plaintiff there, as does Armour here, argued that the right to sue in the courts on a common law cause of action was preserved by the terms of Section 22 of the Act. (49 U. S. C. Sec. 22.) The Court rejected the argument, saying:

"This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words the act cannot be held to destroy itself." (p. 446.)

In a recent case holding that the settled rules requiring preliminary resort under the Interstate Commerce Act apply also under the Shipping Act, the Court commented on Section 22 as follows:

"the decisions of this court compelling a preliminary resort to the commission were made in the face of a clause in § 22 of the Interstate Commerce Act, that nothing therein contained should in any way abridge or alter existing common law or statutory remedies, but that the provisions of the act were in addition to such remedies * * *." *United States Nav. Co.* v. *Cunard Steamship Co.*, 284 U. S. 474, 485, 486 (1932).

In *Loomis* v. *Lehigh Valley R. R.*, 240 U. S. 43 (1916), the plaintiff complained that the carrier had "failed to perform its common law duty to furnish adequate cars"; nevertheless, preliminary resort to the Commission was required.

In *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477 (1918), the state court had granted damages for an alleged violation of the common law duty to transport shipments by the cheapest route. This Court held that, since the routing of the shipments was in accordance with the estab-

lished practice, "the courts may not be resorted to until the administrative question [of the validity of the practice] has been determined by the Commission." (p. 484.)

In *Midland Valley R. R.* v. *Barkley*, 276 U. S. 482 (1928), suit was brought for damages for failure to furnish enough cars. The defendant had furnished all the cars that the plaintiffs were entitled to under the established practice, just as the treatment of Armour's shipments is in accordance with the long established practice. The plaintiffs' contention was stated by the Court as follows:

> "The plaintiffs contend, and the state court held, that the action lay because it was brought to enforce the common law duty of the carrier to furnish cars [citing one case]—a duty confirmed by the statutes of the State (Crawford & Moses, Arkansas Digest, 1921, Sec. 895), and recognized by the Interstate Commerce Act. They argue that the right to bring an action in the courts of a State for a breach of that duty has been specifically preserved to the shipper by § 22 of the Interstate Commerce Act * * *." (pp. 483, 484.)

It was held that the action could not be maintained without preliminary resort to the Commission, the Court saying:

> "The law exacts only what is reasonable from such carriers. The reasonableness of the rule adopted by the carrier is a matter for the Commission." (p. 485.)

Similarly, the law exacts only what is reasonable from the defendants in connection with the delivery, and the reasonableness of the established rule and practice is a matter for the Commission.

Plaintiff's reliance upon *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128 (1891) is significant. That suit was begun on June 1, 1886, prior to the enactment of the Interstate Commerce Act in February, 1887. Since Section 22 provided "That no pending litigation shall in any way be affected by this Act", there was no question of loss of jurisdiction of the cause in the courts. Neverthe-

less, immediately following the passage of the Act, the plaintiff in that suit recognized that his claim, which Armour asserts to be identical with Armour's claim, was one within the jurisdiction of the newly created Commission. He therefore began proceedings before that body on the same cause of action previously submitted to the courts. The Commission held that it had jurisdiction of the claim, despite the pendency of the court action, and issued its order in *Keith* v. *Kentucky Central R. R. Co.*, 1 I. C. C. 661 (1887). Thus, the very case upon which Armour relies for its argument that the Commission has no authority to try this case is one which the Commission, in its first year of existence, held to be within its jurisdiction.

If the *Covington* cases were begun today, there is little doubt, we submit, that the Commission's jurisdiction would be held to be exclusive in the first instance. As the Court said: "The petition proceeded upon the ground that unjust and illegal discrimination had been and was being made against Keith * * *." (p. 129.) It has long since been settled that on such a claim, preliminary resort to the Commission is required. (*Balt. & Ohio R. R.* v. *Pitcairn Coal Co.*, 215 U. S. 481 (1910); see *Merchants' Elevator* case, pp. 42-44, *supra.*)

Although the question presented to this Court is one of jurisdiction and not of the merits, it may be noted, in view of Armour's stress upon the Court's decision, that both the facts and the holdings in the *Covington* cases are quite different from the facts alleged and relief prayed for in this case. There, the carriers had made the stockyards the exclusive delivering point in the City of Covington and refused to make deliveries at plaintiff's own stockyards or at any other points. Here the carriers offer the shippers, under the tariffs, the choice of consigning for delivery at the Union Stock Yards, the team tracks of the individual railroads at other points in the Chicago district, or the industry tracks of the packers. (See pp. 20-21,

supra.) More than one-third of all direct shipments of livestock arriving in Chicago are unloaded at points other than the stockyards, and the Commission has found the team track facilities of the defendants to be "ample." Furthermore, neither the Commission nor the Court in the *Covington* cases ordered the carrier to provide free egress at the stockyards, which is the relief sought by Swift and Armour. The Court's conclusion was as follows:

> "* * * as the carrier did not offer to establish a stock yard of its own for shippers and consignees, the court below did not err in requiring the railroad company and the receiver to receive and deliver live stock from and to the appellees at their own stock yards in the immediate vicinity of appellant's yards, when the former were put in proper condition to be used for that purpose, under such reasonable regulations as the railroad company might establish." (p. 136.)

Likewise, the Commission's order read as follows:

> "Until the defendants provide some other suitable and convenient place at Covington, where the complainants may ship and receive live stock free from other than the customary transportation charges, the defendants should be and will be required to receive from and deliver such live stock to complainants at their own yards." (p. 603.)

A decree or order such as these would be the equivalent of the dismissal of Armour's suit. The carriers offer ample delivery facilities at Chicago, away from the stockyards, where no yardage charges are assessed. It is Armour's option either to consign for delivery at the Union Stock Yards, obtain free unloading, and pay the customary tariff yardage charge of the Stock Yards Company for the services and facilities of that Company beyond the unloading pens, or consign to one of the other points, perform its own unloading, and pay no yardage charges. The *Covington* cases are as conclusive against Armour on the merits as they are on the present question of jurisdiction

Armour's assertion that the carriers have breached the Uniform Live Stock Contract does not affect the rule requiring preliminary resort to the Commission in a case of this character any more than the claim that they have violated their common law duties. That contract, which was prescribed by the Commission itself, (see p. 19, *supra*) provides that "the carrier agrees to carry to its *usual* place of delivery at said destination * * *." (R. 23.) That "usual" place of delivery at this "station", namely, at Union Stock Yards, as admitted in the complaint, is and has been the unloading pens of the Stock Yards Company rather than some point at the boundaries of the Union Stock Yards. (Pars. 3, 4, 15, R. 6, 10.) The complaint therefore shows on its face that the terms of the contract respecting the place of delivery have been complied with.

Furthermore, the contract is expressly made "subject to the classifications and tariffs in effect on the date of issue of this agreement." (R. 23.) The contract does not purport to give Armour any rights additional to the provisions of the Interstate Commerce Act and the applicable tariffs. Any such attempt would, of course, be invalid. *Chicago & Alton R. R.* v. *Kirby*, 225 U. S. 155 (1912); *Davis* v. *Cornwell*, 264 U. S. 560 (1924); *L. & N. R. R.* v. *Central Iron Co.*, 265 U. S. 59 (1924). The questions to be considered under the statutes, classifications and tariffs are the questions already discussed in this brief—namely, at what point transportation ends, exactly where should delivery be made, and what character of delivery services and facilities may be reasonably demanded of the carriers. These questions require preliminary determination by the Commission. Their answer is not to be found in the terms of the contract itself, nor can it be found by the consideration of pure questions of law. The fact that these issues may be presented in connection with a contract does not give a Court power to make its own decision in the first instance. *Sandusky-Portland Cement Co.* v. *Balt. & Ohio*

R. R., 187 Fed. 583 (C. C. A. 7, 1911); *Goodbody* v. *Pennsylvania R. R.*, 29 F. (2d) 67 (C. C. A. 6, 1928).

Moreover, that this suit does not concern a mere matter of contract rights which the courts would be able to determine in the first instance, is shown by the fact that the complaint seeks an injunction to compel the delivery of future shipments in the manner demanded by Armour. There are no contracts covering such future shipments, and the terms of any contracts which may later be entered into may differ from the present ones, should the Commission prescribe an amendment to the Uniform Contract.

Plaintiff also argues that the need for administrative action here may be avoided because the established delivery practice, it is claimed, constitutes a breach of the Bills of Lading Act, 49 U. S. C., Secs. 89, 90. (Brief, pp. 40-41.) There is no mention of that Act in the complaint, and plaintiff did not mention it in the District Court. It is unnecessary to discuss the fact that it has no application to this case, since it is settled that where the questions raised are of a character which requires the exercise of the administrative judgment of the Commission, the fact that they are presented in a complaint alleging a breach of some statute other than the Interstate Commerce Act does not give the court primary jurisdiction. *Midland Valley R. R.* v. *Barkley*, 276 U. S. 482 (1928); *Keogh* v. *Chicago & N. W. Ry.*, 260 U. S. 156 (1922). In the former case, the suit was brought for an alleged breach of the common law and of a state statute. In the latter, the suit was brought under Section 7 of the Federal Anti-Trust Act. In neither case was a violation of the Commerce Act expressly alleged, yet in both the Court held that the issues presented were within the province of the Commission and not of the courts. In the *Keogh* case the Court remarked that:

> "* * * the amount recovered might, like a rebate, operate to give him a preference over his trade com-

petitors. It is no answer to say that each of these might bring a similar action under § 7. Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief. Compare *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 440." (p. 163.)

This statement is as pertinent to an alleged cause of action under the Bills of Lading Act as it was to an action under the Anti-Trust Law. The same rule was applied to a suit under the Anti-Trust Act when preliminary resort to the Shipping Board was necessary because of the character of the issues. *United States Nav. Co.* v. *Cunard S. S. Co.*, 284 U. S. 474 (1932).

IV.

THE DISMISSAL OF THE COMPLAINT SHOULD BE AFFIRMED BECAUSE OF THE PLAINTIFF'S FAILURE TO JOIN THE UNION STOCK YARD & TRANSIT COMPANY OF CHICAGO, AN INDISPENSABLE PARTY.[1]

Armour's contractual obligations to the Yards Company in respect to the use of the latter's facilities for the delivery of direct shipments are stated by the Commission in its decision in the *Swift* case. (R. 108-110.) It is a matter of common knowledge, moreover, that the individual who owns the Union Stock Yard & Transit Company is also Chairman of the Board of Directors of Armour and Company.[2] It is for these reasons, we assume, that the Yards Company was not named a defendant in this suit.

The Yards Company both owns and operates the prop-

[1] Patrick H. Joyce and Luther M. Walter, as Trustees of the property of Chicago, Great Western R. R. Co., and Holman D. Pettibone, as Trustee of the property of Chicago, Indianapolis & Louisville Ry. Co., for reasons unrelated to the merits, do not join in the argument on this point IV.

[2] A fact shown by the public reports of the Securities and Exchange Commission. (See, also, R. 110.)

erty over which the plaintiff's animals are removed from the unloading pens to the boundaries of the Union Stock Yards. (Complaint, pars. 4 and 19, R. 6 and 13.) The complaint expressly alleges that these shipments of livestock consigned to plaintiff at Union Stock Yards, Illinois, could not be delivered in accordance with the contract of transportation "save by use of the pens, platforms, chutes and other facilities of" the Stock Yards Company, and could not be removed except by the use of the facilities of that Company. (Complaint, par. 19, R. 13.) The yardage charges, which are assessed for the use of those facilities beyond the unloading pens, are assessed by the Yards Company and not by the defendants. (Complaint, Exhibit "D", R. 35.) They are duly filed by the Yards Company with the Secretary of Agriculture. (Complaint, par. 15, R. 11.) There is no allegation that the defendants have ever assessed those charges, or have ever shared in any way in their assessment or collection. The defendants have no control over the assessment of the yardage charges. The well established practice of demanding their payment from the consignee of every animal entering its Stock Yards is that Company's practice, and as stated by the Commission, "For many years the packers, * * * made the practice of which they now complain their own practice." (R. 111.)

The complaint asks the Court to hold that this yardage charge of the Stock Yards Company, on file with the Secretary of Agriculture, is unlawful; and that the Stock Yards Company's long established practice of demanding the payment to it of a yardage charge on all livestock received at its yards is wrongful.[1] It asks the Court to "adjudge

[1] "And the Yards Company has always collected a charge on all animals received in its yards. It may be assumed that shippers, commission men and packers, including the Hygrade Company, have had knowledge of this long existing practice." *Atchison, T. & S. F. Ry.* v. *United States*, 295 U. S. 193, 199 (1935).

and decree" that the plaintiff is entitled to consign its livestock for delivery at the Union Stock Yards and to receive such shipments without paying the Stock Yards Company's published tariff charges, and "free from any lien or claim of the Stock Yards Company." (R. 21, par. 2 of prayer.) It then asks "that a mandatory injunction be entered requiring the Defendants * * * to provide suitable ingress for plaintiff * * * and proper and reasonable egress for removal of its livestock from the unloading pens of the Defendants, or from such other point in said station where delivery may be tendered to Plaintiff, at the Union Stock Yards in Chicago, Illinois, without the payment of any charge or charges therefor, by Plaintiff, to the Stock Yards Company * * *." (R. 21, par. 3 of prayer.) Furthermore, the complaint seeks to recover damages for the past payments of the yardage charges to the Stock Yards Company. (R. 21.)

It is apparent from this statement that the Stock Yards Company is an indispensable party to every part of the relief requested. The position of that Company is sufficiently disclosed in the letter of its president set forth as Exhibit "D" of the complaint (R. 35), quoted in part at page 24, *supra*.

The District Court held that the complaint must be dismissed, not only for lack of preliminary resort to the Commission but also because of the non-joinder of the Stock Yards Company. (R. 54-55.) The Circuit Court of Appeals found it unnecessary to pass upon this point because of its affirmance of the District Court's decision that this case could not be maintained without prior resort to the Commission. (R. 86.)

The fact that the Stock Yards Company is an indispensable party would of itself require affirmance of the decisions of the courts below. Any injunction issued in this case could only be directed against the present de-

fendants, but the Stock Yards Company is the sole owner and operator of the facilities and property the use of which, as the complaint declares, is necessary for the delivery of plaintiff's animals to the Chicago Union Stock Yards, in accordance with the transportation contract. The use of the property and facilities of the Company is also necessary to the removal of the animals to the boundaries of the Union Stock Yards. If that Company should refuse to allow the "suitable ingress" or the "proper and reasonable egress" over its property which the court is asked to order, it would be utterly impossible for the defendants to obey such an injunction. Similarly, if the Company should continue to insist that its services and facilities beyond its unloading pens remain "stockyard services" and have not suddenly become "transportation services" upon the demand of the packers, it would continue to post the yardage charges in its tariffs with the Secretary of Agriculture and collect them from the consignees. Neither the line-haul carriers nor the court, by any judgment in this case, could control such action by the Stock Yards Company. Or if the Company should refuse to permit this use of its property except upon the payment of an exorbitant sum by the railroads, they, and the court itself, would be helpless in the absence of the Yards Company as a party. Any order running solely against the defendants for a failure to obey the court's order could only harm them without in any way making it possible for them to comply with the order. The Yards Company alone can modify or permit the modification of the charges and practices complained of in this action.

Significantly, at the time of making its demands for ingress and egress over that Company's property without payment of the yardage charges, the plaintiff addressed its demands to the Yards Company as well as to the defendants. (Complaint, Exhibits "C" and "F", R. [illegible],

37.) The plaintiff realized that the Yards Company must of necessity be a party to any change in the established practice.

In both previous cases considered by this Court involving attacks by shippers upon charges of the Stock Yards Company in addition to the line-haul rate, the Company was a party defendant. *Atchison, T. & S. F. Ry. Co.* v. *United States,* 295 U. S. 193 (1935) (the *Hygrade* case); *Adams* v. *Mills,* 286 U. S. 374 (1932). In the latter case, the charge collected by the Yards Company was for unloading, but the principle is identical. In both cases the Yards Company was a party defendant and the action was begun before the Commission. The indispensability of that Company as a party to this suit is accentuated by the fact that here, unlike the situation in *Adams* v. *Mills,* there is no allegation that the line-haul carriers participated in the practice complained of, either by collecting the yardage charges, by sharing in those charges or by assisting the Yards Company in its assessment and retention of those charges.

The defect in jurisdiction arising from the failure to join the Yards Company is not restricted to the part of the prayer respecting relief for the future. The fundamental proposition upon which the entire prayer depends is stated in the first paragraph, in which plaintiff seeks an adjudication and decree that the Yards Company has no "lien or claim." (R. 21.) The complaint discloses that the Company asserts that it does have such a lien or claim against Armour for yardage charges, in accordance with its tariffs on file with the Secretary of Agriculture. Obviously, no court could make the ruling requested by plaintiff in a case in which the Company asserting the disputed claim was not a party. Yet that proposition is fundamental to every part of the relief sought. In the

absence of the Yards Company, the ruling that the complaint must be dismissed should be affirmed.

As early as 1827 this Court applied the fundamental rule of law involved here. In *Mallow* v. *Hinde*, 12 Wheat. 193, 196, 198, the Court stated that:

> "For the appellees, it is insisted, that the proper parties are not before the court, so as to enable the court to decree upon the merits of the conflicting claims. And we are all of that opinion.
>
> * * * * * * *
>
> "The rights of those not before the court lie at the very foundation of the claim of right by the plaintiffs, and a final decision cannot be made between the parties litigant, without directly affecting and prejudicing the rights of others, not made parties."

Among the many cases stating and giving effect to this well-settled rule are:

Shields v. *Barrow*, 17 How. 129, 139-141 (1854);
Gregory v. *Stetson*, 133 U. S. 579, 586 (1890);
New Orleans Water Works Co. v. *New Orleans*, 164 U. S. 471, 480 (1896);
Minnesota v. *Northern Securities Co.*, 184 U. S. 199, 235 (1902).

The Yards Company is an indispensable party because it has

> "* * * such an interest in the matter in controversy that it could not be determined without either affecting that interest or leaving the interests of those who were before the court in a situation that might be embarrassing and inconsistent with equity."
>
> *Commonwealth Trust Co.* v. *Smith*, 266 U. S. 152, 159 (1924).

In a recent opinion by the Circuit Court of Appeals for the Ninth Circuit, the authorities upon whether an absent party is, in the language of the cases, an "indispensable" one or is merely "necessary" are collected and discussed at length. *State of Washington* v. *United States*, 87 F.

(2d) 421 (1936). Under the tests there summarized, the Yards Company is indispensable because the Court could not render justice between the parties before it in the absence of that Company, and a decree that the Company does not have the lien or claim which it asserts would have an injurious effect on the interest of the Company. Finally, the court's determination, in the absence of the Stock Yards Company, that the Company's established yardage charges are unlawful and that the plaintiff is entitled to receive its shipments at the Union Stock Yards and use the facilities of the Yards Company without paying its charges are certainly inconsistent with equity and good conscience. It is equally inconsistent with equity that the defendant line-haul carriers should be ordered to provide suitable ingress and proper and reasonable egress for the plaintiff's animals at the Union Stock Yards when, as the complaint asserts, the defendant carriers do not own or control the facilities at the Union Stock Yards and have no control over the Stock Yards Company which is the sole owner and operator of those yards. (R. 6, 7, 13.)

In the absence of the Yards Company, the alleged invalidity of the tariff yardage charges of that Company cannot be adjudicated and the mandatory injunction requested would be futile. In its petition for a writ of certiorari Armour did not question the decision below that the Company is an indispensable party. There is no conflict among the circuits concerning that decision and no other reason why this Court should review it, even if it had been presented as a ground for certiorari.

It is submitted that the failure to join the Yards Company as defendant requires the dismissal of the complaint.

V.

THE COMPLAINT AGAINST THE TRUSTEES AND RECEIVERS SHOULD BE DISMISSED BECAUSE OF PLAINTIFF'S FAILURE TO OBTAIN CONSENT TO BRING THIS SUIT.

Many of the carriers involved are in bankruptcy or receivership and among the defendants are trustees appointed in Section 77 and certain receivers. In the absence of a permissive statute, no trustee or receiver may be sued without the consent of the court which appointed him. *Barton* v. *Barbour*, 104 U. S. 126 (1881). The authorities are listed and discussed at length in *Merryweather* v. *United States*, 12 F. (2d) 407 (C. C. A. 9th 1926).

Section 66 of the Judicial Code of the United States (28 U. S. C., Sec. 125), which is quoted at page 36 of Armour's brief, does not change that rule of law here, since this suit does not involve "any act or transaction of" the trustees and receivers, but, on the contrary, involves the conduct of the business and the management of the property in their hands. With respect to such a suit, that section is inapplicable.

In *Ex Parte Baldwin*, 291 U. S. 610 (1934), it was alleged that the debtor railroad company had broken an agreement with the plaintiff requiring it to maintain train service. The plaintiff sued the trustees, asking that the railroad forfeit its right of way and pay damages of $150,000. With reference to Section 66 of the Judicial Code, the Court, through Mr. Justice Brandeis, stated:

> "That section does not abridge the exclusive jurisdiction of the court over property of which it has taken possession. *In re Tyler*, 149 U. S. 164, 182-4.
>
> "It is true that the Investment Company seeks, in addition to the adjudication of the forfeiture of the right of way, damages 'in the sum of $150,000' from the two railways and 'from the trustees in their said

> capacity as trustees' for failure to maintain the daily schedule of passenger trains set forth in the contract. This prayer of the complaint is no bar to staying the suit in the state court. The exclusive jurisdiction of the bankruptcy court is determined by the main purpose of the suit, which is to have the forfeiture declared and the alleged cloud upon title removed. The claim for damages is merely an incident. Moreover, the breach of contract for which damages are claimed is not 'an act or transaction of the "trustees" in carrying on the business connected with such property.'" (P. 61[illegible])

In a footnote to it[illegible]nion (Note 10 on p. 618 of 291 U. S.) the Court cites numerous decisions to the effect that where Section 66 of the Judicial Code permits suit against a receiver without leave of the court which appointed him "in respect of any act or transaction of his in carrying on the purposes connected with such property," it means only suits brought for the purpose of imposing some liability on the receiver in respect to his acts, and not matters relating to the possession, control, and management of the property by the receiver, or the conduct of the business.

In the *Interborough Rapid Transit* case (*American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.*, 10 Fed. Supp. 512 (D. C. S. D. N. Y. 1935), affirmed 76 Fed. (2) 1002, cert. den. 295 U. S. 760), it was held that a suit for a declaratory judgment that the receiver's proposed disaffirmance of a certain lease would result in the breach of an obligation to the City of New York could not be maintained without the prior consent of the receivership court. With reference to Section 66 of the Judicial Code, Judge Mack said:

> "* * * As uniformly interpreted by the courts, its sole purpose is to make federal receivers amenable to state court suits on causes of action arising out of the ordinary operation of the company in receivership. Actions for personal injuries caused by the negligent operation of a common carrier are a familiar example.

Gableman v. *Peoria, Decatur & Evansville R. R. Co.*, 179 U. S. 335, 21 S. Ct. 171, 45 L. Ed. 220 (1900). On the other hand, causes directly affecting the administration of the receivership res, or property rights therein, do not fall within the provision; to allow such suits to be instituted without leave of the court which has the property in its custody would divest it of its exclusive jurisdiction thereover and lead but to conflict and confusion in administration. Such was not the legislative purpose.

"The city admits that section 66 does not embrace suits intended to establish liens or possessory or ownership rights in the receivership res. [Citing cases.] These cases are sought to be distinguished, however, on the ground that the suit herein proposed involves the management of the company rather than property rights in its assets. Such a distinction ignores the ratio decidendi of the cases cited. An adjudication by another court on questions of the proper management of property in the custody of this court, unless with the consent of this court, would be as much an interference with the administration of that property as a decision on questions of title and possession of the res." (P. 518.)

Plaintiff admits that this suit would result in an interference with the operation and control of the property *in custodia legis*, but urges that: "Such interference as Armour seeks to enforce upon these trustees is the interference of the law itself." (Brief, p. 39.) That argument is beside the point, since the interference in any such case would only occur after the decision of the suit, *i. e.*, after the court had decided that the plaintiff had a rightful claim under the law.

The cases relied upon by the plaintiff do not sustain its position. (Brief, p. 37.) The first two cases cited dealt merely with personal injury suits. In two of the remaining three cases, the court held that Section 66 did not apply to the character of suit involved.

Ex Parte Tyler, 149 U. S. 164 (1893).

(Action by State for collection of taxes against railroad in receivership.)

Central Trust Co. of N. Y. v. *Wheeling & L. E. R. Co.*, 189 Fed. 82 (C. C. N. D. Ohio 1911). (Attempt to garnish funds held by receiver.)

The remaining case relied upon by the plaintiff concerned the form of a proposed order by the receivership court enjoining suits against the receiver, with certain exceptions. *Central Trust Co.* v. *St. Louis, A. & T. Ry. Co.*, 41 Fed. 551 (C. C. E. D Ark. 1890).

The cases concerning personal injuries are very different from the present one. Here the plaintiff is attempting to compel the trustees and receivers to provide for the operation of additional terminal facilities and to extend the scope of the transportation services to be performed by them, as well as asking damages as a result of their having followed the established practice with respect to deliveries at the Union Stock Yards. Such a suit directly interferes with the management and conduct of the estates, and therefore, under the authorities cited above, should be dismissed for want of prior consent by the appointing courts, as the District Court held.

Respectfully submitted,

KENNETH F. BURGESS,
FRANK H. TOWNER,
MEYER MORTON,
ELMER W. FREYTAG,
DOUGLAS F. SMITH,
D. ROBERT THOMAS, JR.

SIDLEY, MCPHERSON, AUSTIN & BURGESS,
Of Counsel.

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APPENDIX.

INTERSTATE COMMERCE COMMISSION
Washington

I, W. P. Bartel, Secretary of the Interstate Commerce Commission, do hereby certify that the attached are true copies of the following:

Complaint filed September 20, 1937;

Pages 4 and 5 of the transcript of the stenographer's notes of the hearing held May 31, 1938, at Chicago, Ill., before Examiner Paul O. Carter; and

Petition for Intervention filed at said hearing,

in Docket No. 27862, *Swift and Company et al.* v. *The Alton Railroad Company, et al.*, the originals of which are now on file and of record in the office of this Commission.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Commission this 13th day of September, A. D. 1938.

W. P. BARTEL,
Secretary of the Interstate Commerce Commission.

(SEAL)

FILED SEPT. 20, 1937.

BEFORE THE

INTERSTATE COMMERCE COMMISSION

SWIFT AND COMPANY, et al.,
vs.
THE ALTON RAILROAD COMPANY, et al.,
} Docket No. 27862.

COMPLAINT.

ROSS DEAN RYNDER,
Attorney for Complainants.

Chicago, September 18, 1937.

BEFORE THE

INTERSTATE COMMERCE COMMISSION

SWIFT AND COMPANY
OMAHA PACKING COMPANY and
G. H. HAMMOND COMPANY

v.

THE ALTON RAILROAD COMPANY
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY
THE BALTIMORE AND OHIO RAILROAD COMPANY
THE CHESAPEAKE AND OHIO RAILWAY COMPANY
CHICAGO AND EASTERN ILLINOIS RAILWAY COMPANY
(Charles M. Thomson, Trustee)
CHICAGO AND NORTH WESTERN RAILWAY COMPANY
(Charles P. Megan, Trustee)
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY
CHICAGO GREAT WESTERN RAILROAD COMPANY
(Patrick H. Joyce and Luther M. Walter, Trustees)
CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY
(H. R. Kurrie and Holman D. Pettibone, Trustees)
CHICAGO JUNCTION RAILWAY
(The Chicago River and Indiana Railroad Company, Lessee)
CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY
(Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees)
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY
(Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees)
The CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY
(The New York Central Railroad Company, Lessee)
ERIE RAILROAD COMPANY
GRAND TRUNK RAILWAY SYSTEM
(Lines in the United States, east of the west bank of the Detroit and St. Clair Rivers)
comprising the following carriers:
Canadian National Railway Company
The Champlain and St. Lawrence Railroad Company
(Canadian National Railway Company, Lessee)
The United States and Canada Rail Road Company
(Canadian National Railway Company, Lessee)
GRAND TRUNK RAILWAY SYSTEM
(Lines west of Detroit and St. Clair Rivers)
comprising the following carriers:
Grand Trunk Western Railroad Company
Cincinnati, Saginaw and Mackinaw Rail Road Company
(Grand Trunk Western Railroad Company, Lessee)
ILLINOIS CENTRAL RAILROAD COMPANY
THE MICHIGAN CENTRAL RAILROAD COMPANY
(The New York Central Railroad Company, Lessee)
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY
THE NEW YORK CENTRAL RAILROAD COMPANY
THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY
THE PENNSYLVANIA RAILROAD COMPANY
PERE MARQUETTE RAILWAY COMPANY
WABASH RAILWAY COMPANY and
(Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers).

COMPLAINT.

The complaint of the above named complainants respectfully shows:

I.

That complainant, Swift and Company, is a corporation organized and existing under the laws of the state of Illinois, with principal office and place of business at Chicago, Ill.; that complainant, Omaha Packing Company, is a corporation organized and existing under the laws of the state of Kentucky, with principal office and place of business at Chicago, Ill.; that complainant, G. H. Hammond Company, is a corporation organized and existing under the laws of the state of Michigan, with principal office and place of business at Chicago, Ill. That Omaha Packing Company and G. H. Hammond Company are wholly owned subsidiaries of Swift and Company. That complainants are engaged in what is commonly known as the packing house business and that they operate packing plants for the processing of live stock in the city of Chicago, Ill., adjacent to the stock yards of The Union Stock Yard and Transit Company of Chicago.

II.

That the defendants above named are common carriers engaged in the transportation of property, wholly by railroad, between points in the State of Illinois and points in the states of Wisconsin, Minnesota, North Dakota, South Dakota, Iowa, Nebraska, Colorado, Kansas, Missouri, Oklahoma, Texas, Indiana, Ohio, and various other states in the United States, as their routes may run, and in connection with other carriers with whom said defendants participate in the through transportation of live stock, in carloads, from various points of origin throughout the

United States to Chicago, Ill.; and as such common carriers are subject to the provisions of the Interstate Commerce Act.

III.

That in the transaction of their businesses during recent years complainants have shipped via the lines of railroad of the defendants herein, from various points of origin as above described, consigned to complainants at Union Stock Yards, Chicago, Ill., what are commonly known as "direct shipments" of live stock. By direct shipments of live stock are meant shipments as to which Swift and Company, Omaha Packing Company, or G. H. Hammond Company, or one of their subsidiaries, agents, or employees is shown as the consignor in the bill of lading, shipping receipt, waybill, or other transportation documents issued by the defendants at the several points of origin, and in which Swift and Company, Omaha Packing Company, or G. H. Hammond Company, or one of their subsidiaries, agents, or employees is shown as the consignee of the shipments at Union Stock Yards, Chicago, Ill.; which are not purchased on the property of The Union Stock Yard and Transit Company of Chicago; and as to which no use by complainants is required or desired of services, facilities, or property of The Union Stock Yard and Transit Company of Chicago, except such as may be incident to the delivery of such shipments to the agents or employees of the complainants at said destination. Such direct shipments of live stock are generally shipments which have been purchased by one of complainants or one of its buyers at some point other than Chicago and have been consigned thence to one of complainants at Union Stock Yards, Chicago, Ill., over the lines of one or more of the defendants. Hereinafter the term "direct shipments" without further definition shall be understood to mean shipments of live stock as defined in this paragraph.

IV.

By proper tariff publication, and by long usage and custom, defendants have constituted the Union Stock Yards in Chicago, Ill., as their terminal for the receipt and delivery of live stock in Chicago, Ill. When direct shipments from points of origin as above described, consigned to one of complainants at Union Stock Yards, Chicago, Ill., have reached their terminus, the cars containing such live stock are, by defendants, placed along certain unloading or chute pens of The Union Stock Yard and Transit Company of Chicago, said chute pens being upon the property of and owned by The Union Stock Yard and Transit Company of Chicago. That such direct shipments are then unloaded from said cars into said unloading or chute pens of The Union Stock Yard and Transit Company of Chicago, by employees of The Union Stock Yard and Transit Company of Chicago, for compensation paid by defendants herein to The Union Stock Yard and Transit Company of Chicago.

V.

In the ordinary course of business, after a direct shipment is unloaded from the car in which it has been transported, into one of the unloading pens of The Union Stock Yard and Transit Company of Chicago, such direct shipment is immediately taken by employees of the defendants' agent, The Union Stock Yard and Transit Company of Chicago, over the protest of complainants, as hereinafter set forth, to so-called holding pens, from which such direct shipment is permitted to be taken by complainants, their agents, or employees, out of the custody of defendants' agent, The Union Stock Yard and Transit Company of Chicago.

VI.

That said agent of defendants, The Union Stock Yard and Transit Company of Chicago, publishes and files with the Secretary of Agriculture (but not with the Commission) a schedule of charges (Amendment No. 3 to U. S. Y. & T. Co. No. 10) in which are named certain yardage charges which are as follows:

Cattle	45 cents per head
Calves (400 lbs. or under)	35 cents per head
Hogs	15 cents per head
Sheep and/or goats	10 cents per head

That the charges per head recited in this section are denominated "yardage charges" and purport to cover services rendered after transportation by defendants, under their line-haul rates, has been completed. That in fact, as applied to complainants' direct shipments, transportation under defendants' line-haul rates is not completed until said direct shipments are delivered to one of complainants and placed in its custody, or until defendants have notified said complainant of the arrival of said direct shipments and afforded such complainant a reasonable time within which to take possession thereof and remove them from the custody of defendants or their said agent. That said yardage charges are improperly and unlawfully exacted from complainants in connection with the transportation service of said direct shipments as defined in section 1 (3) of the Interstate Commerce Act, before a lawful delivery of said direct shipments has been accorded to complainants by defendants, and before complainants have been afforded an opportunity to obtain possession of said shipments.

VII.

That complainants are unable to obtain delivery of their direct shipments from defendants, even by mere egress from said unloading pens to the nearest public street, and

even though their own employees are at said unloading pens ready and willing to accept delivery of said direct shipments of live stock and to remove them by the shortest egress to a public street, without payment of the yardage charges recited in section VI hereof, in addition to the payment of the line-haul freight rates upon said direct shipments duly published and filed with the Commission and applicable to such direct shipments from said points of origin to the terminals of defendants for delivery of live stock at Union Stock Yards, Chicago, Ill.

VIII.

That on or about May 9, 1933, complainant Swift and Company addressed a letter to each of the principal traffic officers of the defendants herein, in which said complainant stated, on behalf of itself and its said subsidiaries, that it was ready, willing, and prepared to accept direct shipments at the reasonable and proper delivery pens of each of said defendants at Union Stock Yards, Chicago, Ill., and within a reasonable time to remove said direct shipments to its own plant without other use of the facilities of The Union Stock Yard and Transit Company of Chicago than an egress to the nearest public street; that on and after May 25, 1933, said complainant would refuse to pay to the defendants or to their agent, The Union Stock Yard and Transit Company of Chicago, any yardage charge upon direct shipments so delivered by the defendants and so accepted and removed by Swift and Company; that Swift and Company at the same time sent a copy of said letter of May 9, 1933 to the agent of the defendants, The Union Stock Yard and Transit Company of Chicago; that on or about May 10, 1933, the President of The Union Stock Yard and Transit Company of Chicago addressed a letter to the Traffic Manager of complainant Swift and Company, in which said President stated that said complainants would

not be permitted to take possession of direct shipments at the unloading pens of The Union Stock Yard and Transit Company of Chicago without payment of the yardage charges of said company for the use of its facilities; and that, unless and until said threat of not paying said yardage charges of The Union Stock Yard and Transit Company of Chicago was withdrawn, or until and unless such charges were paid, that company would not permit live stock consigned to complainants at said Union Stock Yards to be delivered to complainants or their employees on and after May 25, 1933; that thereafter, on or about May 16, 1933, complainant Swift and Company, on behalf of itself and its said subsidiaries, addressed a letter to the chief traffic officer of each of the defendants herein, in which attention was called to said letter of May 10, 1933, signed by the President of The Union Stock Yard and Transit Company of Chicago, advising said defendants that on and after May 25, 1933, The Union Stock Yard and Transit Company of Chicago had no authority to accept or receive live stock for complainants as their agent, for their account, or in their name; that after May 25, 1933, any delivery by any of defendants of complainants' direct shipments of live stock to The Union Stock Yard and Transit Company of Chicago, except as defendants' agent for unloading and delivery, would constitute a conversion of complainants' property; and that any payment by complainants of yardage charges to The Union Stock Yard and Transit Company of Chicago, made to gain possession of said direct shipments after said date, would be under protest, would be for the account of said defendants, and would be made purely in mitigation of damages; that on or about May 24, 1933, complainant Swift and Company, on behalf of itself and its said subsidiaries, addressed a letter to the President of defendants' agent, The Union Stock Yard and Transit Company of Chicago, calling attention to the fact

that said agent had refused to relinquish possession of complainants' direct shipments without payment of said yardage charges; that on or about May 24, 1933, the President of defendants' agent, The Union Stock Yard and Transit Company of Chicago, advised complainants by letter that said Transit Company was willing to accept, from time to time, payment by complainants of said yardage charges after May 25, 1933, with the understanding that such payments would be made by complainants under protest and in mitigation of damages; and that it might also be understood, with respect to each and every of said direct shipments thereafter made to complainants, that a physical demand for delivery and for the right to promptly remove such stock from the premises of said Transit Company, without payment of such yardage charges, was to be considered as having been made by complainants as soon as said direct shipments were unloaded, and that said demand was refused by The Union Stock Yard and Transit Company of Chicago immediately after unloading; and that such demand would actually have been made but for the advice of The Union Stock Yard and Transit Company of Chicago that the same would be continually refused; that on May 19, 1933, each of the defendants addressed a letter to complainants refusing the demands made upon said defendants in complainant's said letter of May 9, 1933.

That on or about September 9, 1935, complainant Swift and Company, on behalf of itself and its said subsidiaries, addressed another letter to each of the principal traffic officers of the defendants herein, again demanding that complainants be permitted to obtain possession of their direct shipments of live stock consigned to the Union Stock Yards, Chicago, Ill., without payment of the yardage charges of The Union Stock Yard and Transit Company of Chicago, and that complainants be permitted imme-

diately to remove such live stock from the unloading pens to a public street by a proper and convenient means of egress to such street, to be designated by defendants, without other use of the property of The Union Stock Yard and Transit Company of Chicago; that on or about September 20, 1935, each of said defendants addressed a letter to complainant Swift and Company, refusing said demand of complainants.

IX.

That since May 25, 1933, in each instance where complainants have been compelled to pay yardage charges on direct shipments to defendants' agent, The Union Stock Yard and Transit Company of Chicago, in order to obtain possession thereof, such payment by each complainant has been made by its check or voucher in favor of The Union Stock Yard and Transit Company of Chicago, upon which there has been stamped by said complainant a notice that said payment is made under protest and in accordance with the terms of the letters above described. That, in addition thereto, after payment under protest of said yardage charges to The Union Stock Yard and Transit Company of Chicago, complainants have, at stated intervals, rendered to each of the defendants, respectively, bills against each of said defendants covering the amount of said yardage charges paid under protest to The Union Stock Yard and Transit Company of Chicago upon so many of the shipments as had arrived during such period via the line of the defendant against whom such bill was made; that all of said demands of complainants for delivery of their direct shipments without assessment of said yardage charges and the payment of each of said bills against said defendants have been refused by the defendants.

X.

That the demands herein recited made upon defendants by complainants have not sought the use by complainants of any of the pens, alleys, runways, overhead drives, or tunnels of defendants' agent, The Union Stock Yard and Transit Company of Chicago, in order to drive live stock to the packing plant of the complainants; but have sought only the lawful right of complainants to be permitted to take possession of their direct shipments of live stock at the unloading pens of the defendants herein at the Union Stock Yards, Chicago, Ill., and thence to remove said direct shipments of live stock to a public street by the shortest and most convenient means of egress, such route of egress to be determined by defendants.

XI.

That the course of conduct of the defendants above described, in so delivering direct shipments of live stock to complainants at Union Stock Yards, Chicago, Ill., as to require complainants to pay yardage charges to defendants' agent, The Union Stock Yard and Transit Company of Chicago, in order to obtain possession of complainants' live stock; the repeated refusal of said defendants to deliver direct shipments to complainants at defendants' live stock terminals at the Union Stock Yards in Chicago, upon payment to defendants of all lawful transportation charges published by the line-haul defendants; and the refusal by defendants of complainants' reasonable and lawful demands for egress from defendants' unloading pens to the nearest public street without payment of yardage charges to The Union Stock Yard and Transit Company of Chicago, constitute an unreasonable rule, regulation, or practice in connection with the transportation and delivery of complainants' said direct shipments, in that complainants are

entitled to reasonably convenient and safe chutes, pens, and ways for discharging live stock from the line-haul defendants' cars and taking live stock from defendants' premises without the imposition of a yardage charge, and because transportation of such direct shipments under defendants' line-haul rates has not ended until complainants have been afforded an opportunity to remove their direct shipments of live stock from the unloading pens of the defendants at Union Stock Yards, Chicago.

XII.

That by reason of the facts stated in the foregoing paragraphs, complainants have been subjected to the payment of rates and charges for the transportation of their direct shipments of live stock, consigned to them at Union Stock Yards, Chicago, Ill., via the lines of the defendants herein, and to the application of rules, regulations, and practices which were and still are unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act; that complainants have been injured thereby to their damage in the sum of $17,500.00 in connection with said direct shipments during a period of two years immediately prior to the filing of this complaint, and will continue to suffer such damage during the pendency of this proceeding.

WHEREFORE complainants pray that the defendants may be required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants and each of them to cease and desist from the aforesaid violations of said act, and to establish and put in force and apply in future to the transportation of direct shipments of live stock from points of origin, as aforesaid, consigned to complainants, or any of them, at Union Stock Yards, Chicago, Ill., rules, regulations, or practices under which complainants may obtain delivery to them by defendants of said direct shipments at reasonably convenient, safe, and suitable chutes, pens, and ways,

and be permitted egress for removal from said unloading pens of such live stock to the nearest public street, via the shortest or most convenient way, to be designated by defendants, without the payment of yardage charges to defendants' agent, The Union Stock Yard and Transit Company of Chicago, and without payment of any charges other than the lawful transportation charges of the defendants for the transportation of such direct shipments from the origin thereof to the Union Stock Yards in Chicago, as provided in the tariffs of the defendants filed with the Commission; or such other reasonable rules, regulations, or practices of similar purport as the Commission may deem proper; and also to pay to complainants by way of reparation for the unlawful charges hereinbefore alleged the total sum of $17,500.00, plus such further amounts as may accrue due to similar violations of complainants' rights by defendants during the pendency of this proceeding, with interest from the date on which each of said yardage charges was paid under protest, or such other sum as, in view of the evidence to be adduced herein, the Commission shall determine that complainants are entitled to under the provisions of said act for violation thereof, and that such other and further order or orders be made as the Commission may consider proper in the premises.

Dated at Chicago, Ill., this 18th day of September, 1937.

SWIFT AND COMPANY,
Union Stock Yards,
Chicago, Illinois,

OMAHA PACKING COMPANY,
2320 South Halsted Street,
Chicago, Illinois,

G. H. HAMMOND COMPANY,
Union Stock Yards,
Chicago, Illinois,

By ROSS DEAN RYNDER,
Their Attorney.

VERIFICATION.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

J. H. BLISS, being duly sworn, deposes and says that he is Assistant Treasurer of Swift and Company, one of the complainants in the above entitled proceeding; that he has read the foregoing complaint, and knows the contents thereof; that the same are true as stated, except as to matters and things, if any, stated on information and belief, and that as to those matters and things, he believes them to be true.

J. H. BLISS.

SUBSCRIBED in my presence, and sworn to before me, by the affiant above named, this 18th day of September, 1937.

ROBYN WILCOX,
(SEAL) *Notary Public.*

Commission expires February 1, 1939.

PROCEEDINGS.

Exam. Carter: Come to order, please, gentlemen. The Interstate Commerce Commission has set for hearing at this time and place, Docket No. 27862, Swift and Company, *et al.*, *versus* The Alton Railroad Company, *et al.* Who appears for complainants?

Mr. Rynder: R. D. Rynder, U. S. Yards, Chicago, Illinois, appearing for complainants.

Exam. Carter: Are there any interveners?

(No response.)

Exam. Carter: Are there any interveners?

Mr. Blanchard: I beg your pardon. Paul E. Blanchard, Armour Building, U. S. Yards, Chicago, Illinois. I wish to file a petition of intervention on behalf of Armour & Company, and perhaps a word of explanation should be

in order. This petition does not broaden the issues. In fact, it does not even ask affirmative relief from the hands of the Commission, the reason being that we have already invoked the jurisdiction of the courts on the same facts, and same subject matter by filing our suit as set forth in the petition, asking not only adjunctive relief against what we regard as the continuous breach of the contracts of transportation, but we have asked for damages for the past because of the breaches of such contracts by the defendant carriers. I think I should explain, in justice to the Commission, why I feel it advisable to go to the courts, instead of the Commission. As this record will show, this question has been the subject of repeated correspondence and conferences. It has been a matter that has been most controversial for five years—

Mr. Smith: The defendants object to the intervener making any statement as to why he is not seeking relief here, but seeking relief in the courts, as immaterial.

Exam. Carter: I will sustain that objection.

Mr. Blanchard: Very well.

Exam. Carter: Have you examined the petition of intervention?

Mr. Rynder: I do not have one.

Mr. Blanchard: Let the record show that counsel for Armour & Company offers to explain to the Commission that its failure to ask for relief from the Commission was not due to any lack of confidence in the Commission, or lack of confidence in its justness in handling matters of this sort, but merely was because the complainant felt this case would have to go to court anyhow, because the carriers would not obey any order of the Commission until they had tested it in court.

Exam. Carter: The Commission will assume your motives were of the highest.

Mr. Blanchard: Thank you very much.

Exam. Carter: Have you any objection to this petition?

FILED AT HEARING 5/31/38.

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Swift and Company, *et al.*
vs.
The Alton Railroad Company, *et al.*

I. C. C. Docket No. 27862.

PETITION FOR INTERVENTION.

Comes now your Petitioner, Armour and Company, and respectfully represents that it has an interest in the matters in controversy in the above entitled proceeding, and desires to intervene in, and become a party to, said proceeding, and for grounds of the proposed intervention says:

I.

That Petitioner is an Illinois corporation, with principal offices at Chicago. That it is engaged in the meat packing business and operates a packing plant adjacent to the plant of Plaintiff, and adjacent to the premises of the Union Stock Yards and Transit Company described in the Complaint.

II.

That for many years Petitioner has received as consignee at Union Stock Yards, Illinois, direct shipments of live stock (as defined in the Complaint) which receipts moved to Union Stock Yards from points outside the State of Illinois, via the lines of one or more of Defendants herein, as to none of which any service was required or desired at Union Stock Yards save the service of tender of delivery and delivery by Defendants, ingress for an agent or employee of Petitioner, to the point of such

tender, and delivery for the purpose of the acceptance thereof, and egress from such point for such agent or employee with such delivered live stock.

III.

Petitioner concurs in and adopts the statements made in Paragraphs IV, V, VI, VII, VIII, IX and X of the Complaint. But in so far as said Paragraphs are limited, in their application to the business and actions of complainant, Petitioner alleges that said statements are equally true, and equally applicable to and descriptive of the business and actions of Petitioner.

IV.

Petitioner agrees with but does not concur in, the allegations of Paragraph XI of the Complaint. Petitioner further alleges, that as to each and every such direct shipment of live stock, consigned to it at said Union Stock Yards, on and after May 25, 1933, one or more of said Defendants entered into a written contract severally, or with other common carriers, for the transportation thereof; and that in failing and refusing to deliver said shipments, on and after May 25, 1933, each Defendant, as to each such contract, deliberately and wilfully breached, and failed to perform the same, in that each Defendant refused to complete its engagements made in each such written contract, although each such contract was fully performed by Petitioner. That by reason of such breach, Petitioner was damaged, and each such breach therefore gave rise to an action in a court of law.

V.

That prior to the date hereof, Petitioner invoked the aid of a court of law, and duly filed in the Circuit Court of Cook County its complaint in equity, asking that each of the Defendants therein (or most of them) be enjoined from the repeated, deliberate and intentional violations of its written contracts, and that damages be awarded Petitioner for the previous breaches of all of said contracts by the Defendant delivering each direct shipment thereunder.

VI.

That as a result of said action by Petitioner it is not necessary to complain here of the fact that, as to Petitioner's shipments, such repeated breaches do constitute an unreasonable practice as alleged in the complaint herein. But although Petitioner seeks no remedy here, Petitioner is interested in the facts developed herein, and has the interest in the subject matter hereinbefore set forth.

WHEREFORE, said Armour and Company prays leave to intervene and be treated as a party hereto, with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person, or by counsel upon brief and at the oral argument, if oral argument be had.

Dated at Chicago, Illinois, May 31, 1938.

ARMOUR AND COMPANY,

Petitioner.

By W. S. CLITHERO,

Vice-President.

PAUL E. BLANCHARD,
Paul E. Blanchard, U. S. Yards,
Chicago, Illinois,

Attorney for Petitioner.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

W. S. CLITHERO, being duly sworn, deposes and says: that he is the Vice-President of Armour and Company, Petitioner in the above entitled proceeding; that he has read the foregoing petition and knows the contents thereof; that the same are true as stated.

W. S. CLITHERO.

Subscribed in my presence, and sworn to before me, by the affiant above named, this 31st day of May, 1938.

J. A. DORIN,
(NOTARIAL SEAL) *Notary Public for Cook County, Illinois.*

My Commission expires Mar. 11, 1939.

UNITED STATES OF AMERICA, }
NORTHERN DISTRICT OF ILLINOIS. } ss:

I, HOYT KING, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that the annexed and foregoing is a true and full copy of the original CERTIFIED COPIES from Interstate Commerce Commission, towit:

Complaint filed September 20, 1937;

Pages 4 and 5 of the transcript of the stenographer's notes of the hearing held May 31, 1938, at Chicago, Ill., before Examiner Paul O. Carter; and

Petition for Intervention filed at said hearing, in Docket No. 27862, Swift and Company, *et al. vs.* The Alton Railroad Company, *et al.*,

filed in this Court on the 15th day of October, A. D. 1938, in cause entitled *Armour & Co.* v. *The Alton Railroad Company, et al.*, Equity No. 16171, now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 17th day of December, A. D. 1940.

HOYT KING,
Clerk.

(SEAL)

By EDWARD E. DOUGLAS,
Deputy Clerk.

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SUPREME COURT OF THE UNITED STATES.

No. 293.—October Term, 1940.

Armour and Company, a corporation, Petitioner, *vs.* The Alton Railroad Company, a corporation, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[February 3, 1941.]

Mr. Justice Black delivered the opinion of the Court.

This litigation is the latest episode of a long struggle involving the meat packers, the railroads, and the Union Stock Yard and Transit Company of Chicago.[1] Basically, on the merits the issue here presented is whether Armour and Company, one of the packers, is correct in its contention that under the facts of this case the railroads must deliver its shipments of livestock at such a location and in such a manner that it need pay no "yardage charge" to the Stock Yards Company. The case is here on certiorari (311 U. S. —) from the Court of Appeals for the Seventh Circuit,[2] which affirmed a District Court order dismissing Armour's complaint against the railroads.[3] The ground on which the Circuit Court affirmed was that the issues involved presented administrative problems, necessitating primary resort to the Interstate Commerce Commission.[4] The sole question we find it necessary to decide is whether the Circuit Court was correct in this conclusion.

It is petitioner's contention that its complaint showed a wilful failure and refusal on the part of the railroads to deliver livestock

1 See Adams *v.* Mills, 286 U. S. 397; Atchison, T. & S. F. Ry. *v.* United States, 295 U. S. 193.

2 111 F. (2d) 913.

3 27 F. Supp. 625.

4 The District Court, in addition to relying on this ground, held that the complaint should be dismissed for failure to join the Stock Yards Company as a defendant, and for failure to obtain consent of court to bring suit against railroads which were in receivership. We express no opinion on the correctness of those holdings.

to petitioner in accordance with the railroads' contractual and common law duties; that instead of delivering to petitioner, the railroads delivered to the Stock Yards Company—contrary to petitioner's express direction—with full knowledge that the Stock Yards Company would not effect a delivery to petitioner without first exacting a yardage charge in addition to the agreed transportation charges set out in the railroads' regular published tariffs; and that petitioner's right to proceed in the courts for such a breach of duty exists under the provisions of 49 U. S. C., Sections 9 and 22.[5] But respondents contend, and both courts below held, that the issues tendered by the complaint are not so simple as petitioner would have them seem. Their view is that adjudication of the issues presented relates to such complex transportation problems that determination of the legal questions must necessarily be preceded by the consideration of extensive evidence in a specialized field, and that decision of such questions is by statute vested exclusively in the Interstate Commerce Commission.[6] Since the cause was dismissed without answer or evidence, it is on the basis of the allegations of the complaint that we must apply the controlling law.

The factual situation, according to the complaint, is as follows: For many years prior to 1933 the railroads held themselves out as ready to transport goods to "Union Stock Yards, Illinois", and petitioner shipped to itself at that station much livestock from various points of origin in the United States. None of the railroads own or operate a depot or terminal facilities for the unloading and delivery of livestock, but all of them jointly have long had arrangements with the "Union Stock Yard and Transit Company", a public stock yard, for the use of its terminal facilities. This public stock yard is a common carrier, subject in some respects to the jurisdiction of the Interstate Commerce Commission, and in others to that of the Secretary of Agriculture. Its unloading charges, fixed according to a tariff published and on file with the Interstate Commerce Commission, are collected by the

[5] Section 9 provides for concurrent jurisdiction of the Interstate Commerce Commission and the courts "for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter. . . ." Section 22 provides that "nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies; . . ."

[6] Cf. Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U. S. 426; Mitchell Coal & Coke Co. v. Pennsylvania R. R., 230 U. S. 247.

railroads from petitioner and other shippers and are in turn paid to the Stock Yards Company.[7] This charge, however, does not include payment for use of the facilities after unloading and before delivery to consignees, or for any services then performed. To cover these items, the Stock Yards Company collects an additional charge, since 1921 contained in a tariff filed with the Secretary of Agriculture,[8] and it is this charge which is at the root of the present controversy.

In 1933 petitioner, without resort to the Interstate Commerce Commission, demanded that the railroads alter this long-standing practice so as to relieve it from payment of this additional charge. Pursuant to its purpose, petitioner notified the railroads that it would not thereafter utilize any services after unloading; asked that tender of delivery be made to it immediately after unloading so that it could remove its stock to its own plant; avowed its readiness thereafter to accept delivery at such "reasonable and proper delivery pens of the carrier" at "Union Stock Yards, Illinois," as might be provided by the railroads; demanded that the railroads either directly or through their agent, the Stock Yards Company, deliver the consigned stock to petitioner without any charges except those paid for transportation; and declared that delivery to the Stock Yards Company contrary to petitioner's demand would be treated as a conversion of property for which the railroads would be held responsible. Notwithstanding this demand the railroads continued to deliver petitioner's consignments to the Stock Yards Company and that Company, over petitioner's protest, continued to exact the controverted charge. The railroad companies knew that delivery to petitioner would only be made by the Stock Yards Company on Company property and with no means of egress save by crossing other property of the Company, for which privilege a charge would be exacted.

The complaint adds that in spite of this demand the railroads have "continuously refused to provide or establish by lease or otherwise at their said common station, Union Stock Yards, Illinois, any depot or platforms, pens or facilities" where petitioner might

[7] Special statutory provision requires railroads delivering at public stockyards to unload the livestock. "Transportation . . . of ordinary livestock . . . destined to or received at public stockyards shall include . . . delivery . . . into suitable pens. . . ." 49 U. S. C. § 15(5).

[8] Packers & Stockyards Act, 42 Stat. 159, 7 U. S. C. § 181 *et seq.* Before 1921, this charge was fixed by the Stock Yards Company itself.

accept delivery of its stock without payment of the controverted charge, and have also "failed to make any arrangement with its said agent under . . . which the plaintiff might have free ingress . . . and egress . . . to a public street." Specifically, two breaches are alleged: (1) a breach of duty in failing "to provide reasonably convenient, accessible and safe unloading pens, at the said common depot or station, at which such livestock could be tendered to plaintiff"; and (2) a breach of contract in "failing to afford to plaintiff an opportunity of receiving its livestock and of removing the same with reasonable promptness from the unloading pens used by defendants at Union Stock Yards, Chicago, Illinois, or from any point at which delivery thereof is tendered . . . ." The contract relied on provides "That the carrier has received from the shipper . . . the livestock . . . consigned and destined as indicated below, which the carrier agrees to carry to its usual place of delivery at said destination, ..." The usual place of delivery for livestock shipped to Union Stock Yards, Chicago, Illinois, and indeed the only place of delivery ever utilized at that station so far as the complaint shows is the public stock yards.

The complaint concludes with a prayer for affirmative relief: an adjudication that petitioner is entitled to delivery free of any charges other than those filed with the Interstate Commerce Commission; a mandatory injunction to require such delivery; and an accounting for those charges paid under protest.

This statement of the facts alleged in the complaint reveals that there are many questions relating to complex transportation problems that must be solved as a prerequisite to a determination of whether the railroads, in violation of contracts or governing laws, have failed properly to deliver petitioner's livestock.[9] For illustration:

First. At what point did the common carriers' duty to transport come to an end? Neither the statute nor any applicable principle of governing law can be said to mark this boundary, under all circumstances and conditions and in all cases.

[9] Cf. Texas & Pacific Ry. *v.* Abilene Cotton Oil Co., 204 U. S. 426; Mitchell Coal & Coke Co. *v.* Pennsylvania R. R., 230 U. S. 247; United States *v.* American Sheet & Tin Plate Co., 301 U. S. 402. Petitioner relies on Covington Stock Yards Co. *v.* Keith, 139 U. S. 128. But that case, a suit originally instituted before Congress adopted the Interstate Commerce Act, is not determinative of the respective jurisdictions of the courts and the Commission in this case.

Second. Under the allegations of the complaint, the practice of delivering livestock to the public stock yards in Chicago, and the practice of the Stock Yards Company of exacting a charge from consignees, are long-standing customs. Shippers, railroads, the Stock Yard Company, and the Interstate Commerce Commission alike have left these practices in effect over a long period of years. If use of the terminal facilities for egress to the street after unloading of livestock is a part of transportation, as petitioner alleges, and if this use is a service for which reasonable compensation is justified, it cannot be doubted that this charge, like the unloading charge, is a part of that reasonable transportation rate determination of which is committed to the jurisdiction of the Interstate Commerce Commission. And before such long-standing transportation customs can be held illegal, it is of course necessary that evidence be heard.

Third. If the railroad delivers through the public stock yards, and petitioner's position is sustained, the railroad must necessarily absorb the additional charge. Under the complaint, this would be upon the basis that the railroad had not fully performed its transportation service. Yet the tariff charges for shipping petitioner's livestock were based upon the long-standing custom in which petitioner and the other packers had acquiesced. The railroad is entitled to receive and the shipper is required under the statute to pay a just and reasonable rate. A court judgment in favor of petitioner would reduce the compensation of the railroads for the performance of their services, and would in effect constitute a readjustment of their rate schedules.

Fourth. If, as petitioner insists, it is the duty of the railroads to provide terminal facilities which they do not now own, possess or control, a drastic change might have to be accomplished by them. Property might have to be acquired, expensive facilities might have to be secured, and correspondingly, rates might have to be adjusted. The need for such steps raises a transportation problem of the greatest magnitude, involving many intricate considerations such as must always play a part in evaluating a claim that new depots and facilities are necessary.

Fifth. The complaint shows that there is no provision in the tariff which would authorize the railroads to make refunds to petitioner of those charges paid by petitioner to the Stock Yards Company. Such refunds, if made, would be in the nature of special

allowances not authorized by the tariff. A court's adjudication of this question in this case would not uniformly benefit all shippers for whom respondents have transported livestock. Whether or not such a refund would amount to a discrimination should be determined by studies such as those the Interstate Commerce Commission is especially empowered to make.

Sixth. The complaint alleges that petitioner is willing to accept delivery at any point in the station area. What the station area embraces is not defined. Whether there is property in the area on which the railroads could erect pens is not shown. To decide this issue would require a court to define the boundaries of a station named in a tariff approved by the Interstate Commerce Commission.

The complexities of the situation here presented are graphically illustrated in the companion case of *Swift & Co.* v. *Alton R. R.*, 238 I. C. C. 179. Swift, one of Armour's competitors, took its petition for alteration of the same long-standing practice directly to the Commission. That expert body found it a necessary prerequisite to decision to have a trial examiner conduct extensive hearings, compiling in the process a record of 5 volumes, 1147 pages, and numerous exhibits.[10]

The principles making up the so-called primary jurisdiction doctrine are well settled. This is obviously a case for their application. The decision below is accordingly

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[10] For instances where this Court has referred to the Commission's reports as indicative of the administrative problems involved in particular cases, see Loomis *v.* Lehigh Valley R. R., 240 U. S. 43, 50-51; Northern Pacific Ry. *v.* Solum, 247 U. S. 477, 483.